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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1902

No. 711

BENJAMIN F. JOHNSON, PETITIONER,

vs.

MANHATTAN RAILWAY COMPANY ET AL.

No. 721

LILLIAN BOEHM, PETITIONER,

vs.

MANHATTAN RAILWAY COMPANY ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONS FOR CERTIORARI FILED FEBRUARY 11, 1903.
FEBRUARY 23, 1903

CERTIORARI GRANTED MARCH 30, 1903

(37,408, 37,418)

INDEX.

	PAGE
Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit	1
Order Granting Benjamin F. Johnson Leave to File Bill of Complaint	7
Equity Subpoena	8
Petition of Benjamin F. Johnson for Leave to File Bill of Complaint	10
Bill of Complaint of Benjamin F. Johnson	13
Supplemental Bill of Complaint of Benjamin F. Johnson	49
Supplemental Subpoena	67
Supplemental Petition of Benjamin F. Johnson	69
Bill of Complaint of Lillian Boehm	80
Order to Show Cause of September 21st, 1932 on Petition of Benjamin F. Johnson	114
Petition of Benjamin F. Johnson	118
Order to Show Cause of October 1st, 1932 on Petition and Supplemental Bill of Complaint of Benjamin F. Johnson	123
Petition of Benjamin F. Johnson	126
Order to Show Cause of October 3rd, 1932 on Petition of Lillian Boehm	130
Petition of Lillian Boehm	133
Order Granting Lillian Boehm Leave to Intervene	137
Petition of Lillian Boehm for Leave to Intervene	139
Order Granting Manhattan Common Stockholders' Protective Committee Leave to Intervene	142

PAGE

Petition of Manhattan Railway Company's Common Stockholders' Protective Committee for Leave to Intervene 144

Petition for Contingent Intervention by Harold Palmer and Others as the Protective Committee for Holders of Manhattan Seven Per Cent. Guaranteed Stock 147

American Brake Shoe Bill of Complaint..... 153

Interborough Answer in American Brake Shoe Case 171

Exhibit A—Extract from the Minutes of the Special Meeting of the Board of Directors of Interborough Rapid Transit Company, held Thursday, August 25, 1932 at 4 o'clock P. M. 173

Affidavit Showing Necessity of Individual Receivers 175

American Brake Shoe Record 177-552

Designation and Assignment of Hon. Martin T. Manton to Hold a District Court for the Southern District of New York 177

Order under Section 23, Judicial Code, as to Division of Business of District Court 178

Order Appointing Temporary Receivers 180

Order Appointing Receivers' Counsel 185

Order Appointing Tort Creditors' Committee 187

Order Granting Leave to Intervene to Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds 189

Order Granting Leave to Intervene to the Committee Constituted by and Acting under the Deposit Agreement Dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes 191

Order for Intervention of Committee for the Protection of the Holders of Ten-Year 6%

PAGE

Gold Notes of Interborough Rapid Transit Company Under Deposit Agreement dated as of July 18, 1932 193

Order Dated September 6, 1932, Appointing Temporary Receiver for Manhattan Railway Company 196

Order Granting Leave to Intervene to Committee for Manhattan Railway Company Consolidated Mortgage Gold Four Per Cent. Bonds 201

Order Appointing Counsel for Receiver of Manhattan Railway Company 203

Amendment of Order Appointing Tort Creditors' Committee to Include Tort Claimants 205

Order Authorizing Receivers to Number Documents and Papers 208

Order Authorizing Receivers to Maintain a Printed Record of all Documents 209A

Order Authorizing Receivers to Pay Expenses for Registration and Transfer of Stock of Interborough Rapid Transit Company 210

Order Deferring Payment of State Franchise Tax 212

Order Granting Leave to Central Hanover Bank and Trust Company to Intervene... 214

Order Authorizing Receivers to Employ Court Reporters 217

Order Granting Leave to Central Hanover Bank and Trust Company, as Trustee, to make Receivers Parties Defendant to Bill of Complaint 219

Order Granting Leave to Intervene to Harold Palmer and Others as Protective Committee for 7% Stock of Manhattan Railway Company 221

Order Continuing Receivership 223

PAGE

Order Making Guaranty Trust Company of New York, a Party and Directing Hearing on Receivers' Application as to Payments under Manhattan Lease 226
Order Respecting Sinking Fund Moneys 228
Order Terminating Appointment and Employment of Chadbourne, Stanchfield & Levy as Solicitors and General Counsel for Interborough Receivers 229
Order Appointing Hornblower, Miller, Miller & Boston as Solicitors and General Counsel for Interborough Receivers 230
Receivers' Application No. 1 231
Affidavit by Receivers' Counsel 234
Consent and Waiver of Notice as to Appointment of Receivers' Counsel 236
Petition for Order Granting Leave to Intervene to Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds 237
Petition for Order Granting Leave to Intervene to the Committee Constituted by and Acting Under the Deposit Agreement dated as of July 19, 1932 for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes 240
Petition for Order for Intervention of Committee for the Protection of the Holders of Ten-Year 6% Gold Notes of Interborough Rapid Transit Company Under Deposit Agreement Dated as of July 18, 1932 243
Petition of Manhattan Railway Company for Extension of Receivership and Appointment of Separate Receiver for Lessor 248
Notice of Motion for Leave to Intervene—Committee for Manhattan 7% Stock..... 256

PAGE

Proposed Order—Intervention of Committee for Manhattan 7% Stock 258
Motion for Leave to Intervene—Committee for Manhattan 7% Stock 259
Petition for Intervention by Protective Committee for Holders of 7% Guaranteed Stock of Manhattan Railway Company 260
Exhibit 1, With Petition for Intervention by Protective Committee 264
Receivers' Petition Respecting Seven Per Cent. Notes 267
Petition for Order Granting Leave to Intervene to Committee for Manhattan Railway Company Consolidated Mortgage Gold Four Per Cent. Bonds 272
Manhattan Railway Company Receivership—Affidavit Showing Action of and Approval by Manhattan Board of Directors 275
Receivers' Application No. 3—September 8, 1932 278
Receivers' Application No. 4—September 8, 1932 282
Receivers' Application No. 5—September 8, 1932 286
Receivers' Application No. 6, September 8, 1932, as to Postponement of Payment of State Franchise Tax 290
Application No. 1 of Receiver of Manhattan Railway Company as to Appointment of Counsel 294
Affidavit by Counsel for Receiver of Manhattan Railway Company 296
Petition of Central Hanover Bank and Trust Company for Leave to Intervene 298
Affidavit of Publication of Notice to Creditors 303
Amended and Substituted Petition for Intervention by Harold Palmer and Others as

PAGE

Protective Committee for Holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company (and Cross-Petition) ... 305

Notice of Filing Amended and Substituted Petition for Intervention on Behalf of Harold Palmer and Others as Protective Committee 324

Petition for Intervention by Elon S. Hobbs.. 326

Receivers' Application No. 9—Petition of Receivers for Instructions with Respect to Payments Payable October 1, 1932 and Thereafter, Under the Manhattan Lease; Also that Guaranty Trust Company of New York, Trustee, Be Made a Party..... 329

Receivers' Application No. 7, September 21, 1932—Petition for Order Authorizing Receivers to Employ Court Reporters 344

Waiver and Consent 346

Notice of Motion for Order Respecting Sinking Fund Moneys 348

Receivers' Application No. 8—Application of Receivers for Instructions with Reference to Certain Sinking Fund Moneys Now Held by Guaranty Trust Company of New York, as Trustee under First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913..... 351

Notice by Receiver of Manhattan Railway Company of Application for Order Re Interest Due on First Mortgage Bonds of Manhattan and for Payment of Taxes..... 364

Petition of Receiver of Manhattan Railway Company for Order for Payment of Interest on First Mortgage Bonds of Manhattan and for Payment of Taxes..... 366

Answer of Committee for Interborough Rapid Transit Company Ten-Year Six Per Cent.

PAGE

Gold Notes to Petition by Receiver of Manhattan Railway Company..... 373

Answer of Committee for Interborough Rapid Transit Company Ten-Year Six Per Cent. Gold Notes to Receivers' Petition for Instructions 376

Answer of Trustee of the Interborough Mortgage to the Petition of the Manhattan Receiver Verified September 28, 1932..... 378

Answer of Trustee of the Interborough Mortgage to the Petition of the Interborough Receivers Verified September 28, 1932..... 387

Answer of Committee Representing Interborough 5% Gold Bonds to Petition of the Manhattan Receiver Verified September 28, 1932 395

Answer of Committee Representing Interborough Ten-Year Secured Convertible 7% Gold Notes to Petition of the Manhattan Receiver Verified September 28, 1932..... 402

Answer of Committee Representing Interborough 5% Gold Bonds to the Petition of the Interborough Receivers 409

Answer of Committee Representing Interborough Ten-Year Secured Convertible 7% Gold Notes to the Petition of the Interborough Receivers Verified September 28, 1932 415

Notice of Appearance of Counsel on Behalf of Guaranty Trust Company of New York, as Trustee 421

Petition of Central Hanover Bank and Trust Company, as Trustee, to Make Receivers Parties Defendant to Bill of Complaint.... 424

Answer of Receiver of Manhattan Railway Company to the Petition of the Receivers of the Interborough Rapid Transit Company, Verified September 28, 1932..... 426

PAGE

Answer of The American Brake Shoe and Foundry Company, Plaintiff in this Cause, to the Petition of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers for Defendant, Filed September 28, 1932..... 432

Answer of The American Brake Shoe and Foundry Company, Plaintiff in this Cause, to the Petition of William Roberts, Receiver of Manhattan Railway Company, Filed September 28, 1932..... 435

Notice of Motion on Petition of Central Hanover Bank and Trust Company, as Trustee, for Payment of Taxes and Interest, Segregation of Income and Other Relief..... 439

Petition of Central Hanover Bank and Trust Company, as Trustee, for Payment of Taxes and Interest, Segregation of Income and Other Relief 442

Exhibit A—Bill of Complaint..... 454

Bond of William Roberts, Receiver of Manhattan Railway Company..... 478

Bond of Thomas E. Murray, Jr., Receiver of Interborough Rapid Transit Company.... 481

Bond of Victor J. Dowling, Receiver, Interborough Rapid Transit Company..... 488

Affidavit of Victor J. Dowling..... 498

Affidavit of Publication of Notice to Creditors of Manhattan Railway Company..... 500

Notice of Motion by Protective Committee for 7% Stock of Manhattan Company in Re Receivers' Application No. 9..... 502

Motion of Harold Palmer and Others as Protective Committee for Manhattan Railway Company Seven Per Cent. Guaranteed Stock Relating to Proposed Instructions to Receivers on Their Application No. 9..... 503

PAGE

Proposed Order as to 7% Stock of Manhattan Company, in Relation to Receivers' Application No. 9 505

Answer of Interborough Receivers to Petition of William Roberts, Receiver of Manhattan 507

Supplemental Petition of Receivers to Receivers' Application No. 9 for Instructions Respecting October 1, 1932, Payment Under Manhattan Lease 520

Affidavit of H. M. Fisher, Treasurer for Receivers, as to Cash—Submitted in Hearing on Receivers' Application No. 9 529

Schedule A to Affidavit of H. M. Fisher (Three Sheets) 534

Sunderland Exhibit B (Two Sheets) of October 7, 1932 537

Opinion on Petitions of Interborough Receivers and of Manhattan Receiver as to Payment of Past Due Taxes and Interest Due October 1, 1932, on Manhattan Bonds .. 539

Answer of Central Hanover Bank and Trust Company, as Trustee, to Petition of Interborough Receivers, Verified September 28, 1932 545

Petition of Chadbourne, Stanchfield & Levy to Terminate their Appointment and Employment as Solicitors and General Counsel for the Interborough Receivers 548

Affidavit by Nathan L. Miller of Hornblower, Miller, Miller & Boston, Solicitors and General Counsel for the Interborough Receivers 551

Affidavit of J. Osgood Nichols 553

Exhibit A to Affidavit of J. Osgood Nichols 573

Exhibit B to Affidavit of J. Osgood Nichols 574-612

Bill of Complaint (Ancillary Suit) 574

PAGE

Exhibits Annexed to Bill of Complaint (Ancillary Suit) 580
Answer (Ancillary Suit)..... 581
Order Appointing Receivers (Ancillary Suit) 583
Order Appointing Receivers' Counsel (Ancillary Suit) 588
Receivers' Application No. 1 (Ancillary Suit) 589
Exhibit 1 to Doc. 5 (Ancillary Suit)..... 592
Exhibit 2 to Doc. 5 (Ancillary Suit)..... 594
Affidavit of Receivers' Counsel (Ancillary Suit) 598
Consent and Waiver Notice as to Appointment of Receivers' Counsel (Ancillary Suit) 600
Petition and Order Authorizing Ancillary Receivers to Number Documents and Papers.. 601
Ancillary Receivers' Application No. 2..... 602
Waiver and Consent 604
Petition and Order Authorizing Ancillary Receivers to Maintain a Printed Record of All Documents 605
Ancillary Receivers' Application No. 3..... 606
Waiver and Consent..... 608
Petition and Order Authorizing Ancillary Receivers to Pay Expenses for Registration and Transfer of Stock of Interborough Rapid Transit Company..... 609
Ancillary Receivers' Application No. 4..... 610
Waiver and Consent 612

Exhibit C, Annexed to Affidavit of J. Osgood Nichols 613
Affidavit of Martin A. Leach..... 663
Affidavit of William Roberts..... 665
Affidavit of William Roberts..... 675
Affidavit of Charles Franklin..... 680
Affidavit of Louis Boehm..... 684

	PAGE
Stipulation Extending Interborough Receivers' Time to Answer	691
Stipulation Extending Manhattan Receiver's Time to Answer	693
Opinion	694
Order of Consolidation	722
Order Vacating Orders of Judge Manton	725
Summons (Order of September 20, 1932)	730
Order of Severance (Order of September 20, 1932)	735
Petition for Appeal from Order of September 20, 1932	738
Assignment of Errors on Appeal from Order of Judge Francis G. Caffey, dated September 20, 1932	742
Bond on Appeal	746
Motion of Committee for 7% Guaranteed Manhattan Railway Company to Strike Their Names from Citation and Order Denying Motion	747
Citation on Appeal (Order of September 20, 1932)	748
Summons (Consolidation Order)	752
Order of Severance (Consolidation Order)	756
Petition for Appeal from Consolidation Order	759
Assignment of Errors on Appeal from Order of October 18, 1932 (Consolidation Order)	764
Bond on Appeal	771
Summons (Vacating Order)	772
Order of Severance (Vacating Order)	776
Petition for Appeal from Order of October 18, 1932 (Vacating Order)	779
Assignment of Errors on Appeal from Order of October 18, 1932 (Vacating Order)	783
Bond on Appeal	805
Citation on Appeal (Vacating Order)	806
Minutes of Hearing before Judge Woolsey, October 4, 1932	812
Minutes of Hearing before Judge Woolsey, October 6, 1932	823

CITATION

PAGE

Minutes of Hearing before Judge Woolsey, October 18, 1932, re Settlement of Orders 983
Stipulation re Contents of Transcript of Record.. 998
Order Approving Stipulation Re Record 1011
Stipulation Waiving Printing of Verifications.... 1012
Stipulation re Hearing of Appeals on One Record. 1016
Stipulation as to Correctness of Transcript of Record 1020
Clerk's Certificate to Transcript of Record 1023

Proceedings in U. S. C. C. A., Second Circuit 1024
Opinion, Hand, J. 1024
Decree 1036
Notice of motion for order amending opinion 1037
Petition for order amending opinion 1039
Affidavit of Carl M. Owen 1043
Order amending opinion 1047
Clerk's certificate 1048
Orders allowing certiorari 1049

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY No. E 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY No. E 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY No. E 71-153

Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit.

I. Statement as to the above entitled suit of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364."

The suit of The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid

Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit.

Transit Company, Defendant, In Equity No. E 70-364, was commenced on the 26th day of August, 1932. The American Brake Shoe and Foundry Company was the original plaintiff and Interborough Rapid Transit Company was the original defendant.

Pursuant to the Bill of Complaint and Answer, on August 26, 1932, Victor J. Dowling and Thomas E. Murray, Jr., were duly appointed Temporary Receivers of the property of the defendant Interborough Rapid Transit Company.

On September 1, 1932, J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds were permitted to intervene as such Committee as a party defendant.

On September 1, 1932, J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes were permitted to intervene as such Committee as a party defendant.

On September 1, 1932, Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, as Committee for the Protection of the Holders of Ten-Year Six Per Cent Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company were permitted to intervene as parties in this suit.

On September 6, 1932, Manhattan Railway Company was, by order, made a party defendant and William Rob-

Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit.

7

erts was appointed Temporary Receiver of the Manhattan Railway Company and its property and assets in this cause.

On September 6, 1932, Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds were permitted to intervene as such Protective Committee as a party defendant.

8

On September 19, 1932, Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company, was permitted to intervene as a party in this cause.

On September 28, 1932, on order of the Court, Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913, was made a party to this cause.

On September 28, 1932, Victor J. Dowling and Thomas E. Murray, Jr., were continued as Permanent Receivers of the Interborough Rapid Transit Company, and William Roberts was continued as Permanent Receiver of the Manhattan Railway Company.

9

On September 28, 1932, Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee for Manhattan Railway Company Seven Per Cent. Guaranteed Stock, were permitted to intervene as such Protective Committee as a party defendant.

On September 6, 1932, without serving formal notice of appearance, Messrs. Milbank, Tweed, Hope & Webb appeared for The Chase National Bank of the City of New York, as Trustee under the Second Mortgage of the Manhattan Railway Company.

The Bill of Complaint was filed on August 26, 1932.

Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit.

The Answer of the Defendant was filed on August 26, 1932.

Leave of the Court having been obtained, the Bill of Complaint of Central Hanover Bank and Trust Company, as Trustee, against Manhattan Railway Company, Interborough Rapid Transit Company, Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of the property of Interborough Rapid Transit Company, William Roberts, as Receiver of the property of Manhattan Railway Company, The Chase National Bank of the City of New York, as Trustee under the Second Mortgage of Manhattan Railway Company, and The American Brake Shoe and Foundry Company, Defendants, was filed in this cause on September 28, 1932.

The defendant was not arrested nor was bail taken.

Victor J. Dowling and Thomas E. Murray, Jr., were appointed Temporary Receivers of the property and assets of Interborough Rapid Transit Company on August 26, 1932, and their receivership was continued during the pendency of the cause on September 28, 1932. William Roberts was appointed Temporary Receiver of the property and assets of Manhattan Railway Company on September 6, 1932, and his receivership was continued during the pendency of the cause on September 28, 1932.

No trial has been had.

No question was referred to a Commissioner or Commissioners, Master or Referee.

The date of the entry of the orders of consolidation and of vacation, respectively, now appealed from, was October 18, 1932.

The date of the entry of final decree was October 18, 1932.

The date when the appeals from said orders were respectively taken was October 20, 1932.

Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit. 13

II. Statement as to the above entitled suit of Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al, Defendants, In Equity E 71-153.

The suit of Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al, Defendants, In Equity E 71-153, was commenced on the 21st day of September, 1932. Benjamin F. Johnson was the original complainant and the Manhattan Railway Company, subject to leave of Court granted by order of Hon. Francis G. Caffey, United States District Judge, on September 14
20, 1932, and now appealed from, William Roberts, as Temporary Receiver of Manhattan Railway Company, Interborough Rapid Transit Company, subject to leave of Court, Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company, The City of New York, and The American Brake Shoe and Foundry Company were the original defendants.

On September 21, 1932, Lillian Boehm was, on consent of the plaintiff, permitted to intervene as a party plaintiff in the above entitled action.

On September 26, 1932, Nathan L. Amster, Chairman, 15
Morton F. Stern, Hon. Peter Ten Eyck, C. R. Jeffers, Secretary, Blin W. Page, and Charles Franklin, attorney for said Committee, as a Manhattan Railway Common Stockholders Protective Committee, were permitted to intervene as party plaintiffs on behalf of Manhattan Railway Company Common Stockholders Protective Committee.

The bill of complaint filed herein on September 21, 1932.

The supplemental bill of complaint by the complainant Benjamin F. Johnson was filed herein on October 1, 1932.

16 *Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit.*

On October 3, 1932, the supplemental complaint of Lillian Boehm, intervenor, was filed herein.

On October 6, 1932, the complainant Benjamin F. Johnson filed his supplemental petition.

No answer has been filed by any of the defendants.

The defendant was not arrested nor was bail taken. No property was attached or arrested.

No trial has been had.

A hearing on the orders of consolidation and of vaca-
17 tion, respectively, which are herein appealed from was held before the Hon. John M. Woolsey, District Judge of the United States District Court for the Southern District of New York on October 6, 1932.

No question was referred to a Commissioner or Commissioners, Master or Referee.

The date when the appeals from each of said orders of October 18th were taken was October 20, 1932.

18

Order Granting Benjamin F. Johnson Leave to File Bill of Complaint. 19

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,
against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

20

IN EQUITY
E 71-153-1932.

21

This cause came on to be heard at this term, and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED as follows, viz.:

1. That the prayer of the petition annexed of Benjamin F. Johnson, verified September 20, 1932, be and the same hereby is granted, and that leave hereby is given to the complainant to file in this Court the bill of complaint mentioned in said petition, with defendants Interborough Rapid Transit Company, and Manhattan Railway Company, and their receivers among the parties defendants thereto.

Dated—New York, September 20, 1932.

FRANCIS G. CAFFEY
U. S. D. J.

Equity Subpoena.

71—153

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

GREETING:

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by

BENJAMIN F. JOHNSON

and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two HUNDRED AND FIFTY DOLLARS ($250).

WITNESS, Honorable JOHN C. KNOX, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 21st day of

September in the year One Thousand Nine Hundred Thirty-two, and of the Independence of the United States the One Hundred and fifty-seventh.

(Sgd) CHARLES WEISER
Clerk.

Charles Franklin,
165 Broadway, N. Y. City.
SOL'T.

The Defendants are required to file their answers or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken PRO CONFESSO.

(Sgd) CHARLES WEISER
Clerk.

28

Petition of Benjamin F. Johnson for Leave to File Bill of Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

29 MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

30

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of Benjamin F. Johnson respectfully shows to this Honorable Court:

1. That he is the complainant in the above entitled cause.

Petition of Benjamin F. Johnson for Leave to File Bill of Complaint.

2. That Messrs. Victor J. Dowling and Thomas E. Murray, Jr., were appointed receivers on or about August 26, 1932, of the above-named Interborough Rapid Transit Company; and that William Roberts was appointed receiver on or about September 6, 1932, of the above-named defendant Manhattan Railway Company.

3. That upon information and belief, the order appointing such receivers contains certain restraining provisions among them restraining the institution or prosecution of suits against the Interborough Rapid Transit Company and Manhattan Railway Company aforesaid.

4. That your Petitioner respectfully begs leave of this Court to make the Interborough Rapid Transit Company and Manhattan Railway Company, parties defendants in this suit and that the receivers above-named of said Interborough Rapid Transit Company and of said Manhattan Railway Company also be joined as parties defendants upon the grounds set forth in the bill filed in this cause.

WHEREFORE, your petitioner prays leave of this Honorable Court to file its said bill of complaint and to include among the parties defendants thereto said Interborough Rapid Transit Company and Manhattan Railway Company, and said receivers, and that an order granting such relief may be made by this Honorable Court, and entered in the above-entitled cause.

Petition of Benjamin F. Johnson for Leave to File Bill of Complaint.

And your petitioner, as in duty bound, will ever pray, etc.

Dated, September 20, 1932.

BENJAMIN F. JOHNSON,
By (Sgd) CHARLES FRANKLIN
Solicitor.

(Signed) CHARLES FRANKLIN
Solicitor for Petitioner,
Office and Post Office Address,
165 Broadway,
Borough of Manhattan,
New York City.

37

Bill of Complaint of Benjamin F. Johnson.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, Complainant, *against* MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Defendants.	IN EQUITY E 71-153 1932

38

39

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

Complainant brings his Bill of Complaint against the above-named defendants, and respectfully alleges the following:

(1) Complainant is a resident of Winchester, Kentucky, and is a citizen of the State of Kentucky, and is the record holder of one hundred (100) shares of the defendant Manhattan Railway Company (hereinafter called Manhattan), having a par value of $10,000.00.

40 *Bill of Complaint of Benjamin F. Johnson.*

(2) On information and belief, that the defendants Manhattan Railway Company and Interborough Rapid Transit Company (hereinafter called Interborough), are railroad corporations, and were at all times hereinafter mentioned, and are now, corporations duly organized and existing under and by virtue of the laws of the State of New York, and are citizens of said State, having their principal offices in the City of New York, in the Southern District of New York. That the defendants Victor J. Dowling and Thomas E. Murray, Jr., are citizens and residents of the State of New York, and were appointed
41 temporary receivers of the defendant Interborough by an order of Honorable Martin T. Manton, U. S. Circuit Judge, on August 26, 1932, on a bill (E. 70-364) filed in the office of the Clerk of this Court; that the defendant, William Roberts, is a citizen and resident of the State of New York, and was appointed temporary receiver of the defendant Manhattan by order of Honorable Martin T. Manton, U. S. Circuit Judge, on September 6, 1932, said appointment having been made on petition of intervention in said suit (E. 70-364). That the defendant American Brake Shoe and Foundry Company is a foreign corporation created and existing under the laws of the State of Delaware, and is made a party defendant on
42 account of its interest in the subject-matter of this suit.

(3) That this is a suit of a civil nature in equity; that the matter in controversy exceeds the sum or value of Five Thousand Dollars, exclusive of interest and costs, and is between citizens of different states.

(4) This action is brought by the complainant in his derivative capacity as a minority stockholder of Manhattan, in its own behalf and in behalf of such other stockholders of Manhattan as may join herein and become

parties hereto (by leave of Court) for the benefit of Manhattan. The bill of complaint herein brought by the complainant as a stockholder of Manhattan is founded upon rights which may properly be asserted by Manhattan. The complainant was a shareholder of Manhattan at the time of the transactions complained of herein. This suit is not a collusive one to confer on a Court of the United States the jurisdiction of a cause of which it would not otherwise have cognizance, and is instituted in good faith for Manhattan's benefit.

(5) Complainant believes and therefore avers that there is imperative need for setting aside the appointments of said receivers, Dowling, Murray and Roberts, and for the appointment of independent receivers under properly constituted authority for the Manhattan Railway Company, and for the Interborough Rapid Transit Company, upon the grounds more particularly set forth herein at length. 44

(6) That the appointment of said receivers, as aforesaid, is believed to have been irregular, without warrant or legal authority, and void, as in violation of the effective rules, practice and procedure in the United States District Court for the Southern District of New York. It is believed that the Honorable Martin T. Manton, U. S. Circuit Judge, assumed, without any legal right or any necessity therefor, the rights, powers and privileges of the United States District Court, to appoint receivers in equity causes for the Interborough, as well as for the Manhattan Railway Company; that the governing rules of this Court duly promulgated and duly published which were violated and contravened in the appointment of said receivers as aforesaid, reads as follows: 45

46 *Bill of Complaint of Benjamin F. Johnson.*

"United States District Court—Southern District of New York.

Matter of the Revision of the General Rules of this court by adding thereto Rule 1-a and Rule 11-a.

Due deliberation having been had, it is ordered that, effective July 1, 1932, the following rule, to be designated as 1-a, shall be and become a General Rule of this court, to wit: '1-a. Any judge designated to sit in the District Court for the
47 Southern District of New York, shall do such work only as may be assigned to him by the senior district judge.'

And also effective as of July 1, 1932, the following rule, to be designated as 11-a, shall be and become a General Rule of this court, to-wit: '11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge."
48

Dated, June 30, 1932.

JOHN C. KNOX
HARRY W. GODDARD
WILLIAM BONDY
FRANK J. COLEMAN
JOHN M. WOOLSEY
FRANCIS G. CAFFEY
ALFRED C. COXE
ROBERT P. PATTERSON
United States District Judges."

(7) Complainant is informed and believes, and therefore avers, that at the time of the application for the appointment of receivers for the Interborough, namely, on August 26, 1932, and at the time of the application for the appointment of receivers for the Manhattan, namely, on September 6, 1932, there was a United States District Judge duly assigned and sitting in the Motion Part of the Court, as well as other District Judges of the United States District Court who were ready, able and willing to entertain the applications for equity receivership of said Interborough and Manhattan. 49

(8) Complainant is informed and believes, and therefore avers, that at the time of the said applications for the appointment of receivers of Interborough and Manhattan, there was no disagreement between the District Judges of the said United States District Court, but said Judges were in entire agreement upon the division of business, and for the assignment of cases for trial, and have ever so continued; that the above quoted rule was duly adopted, approved, signed and published by each of the eight United States District Judges in the said Court. 50

(9) That the above quoted rule was not revoked or abrogated at the time of the appointment of said receivers but was then and now is in full force and effect, and that the District Judge assigned to the Motion Part did not refuse to act upon the applications of Interborough and Manhattan for receivers. 51

(10) Complainant is informed and believes, and therefore avers, that Circuit Judge Manton in making the said appointments and in taking action on the bill of complaint and on the intervention of the Manhattan Railway Company in said cause, unlawfully usurped the

52 *Bill of Complaint of Benjamin F. Johnson.*

duties and functions of the Judges of this Court without legal warrant or any justification.

(11) Upon information and belief, that either the complainant in the Interborough suit, or one of the defendants, or intervenors therein, disregarding the effective rule, practice and procedure in such cases made and provided, and without cause or warrant therefor, prepared or caused to be entered, two separate orders dated August 25, 1932, as follows, both of which orders are believed to be irregular, unlawful and improper, and
53 without necessity or any justification therefor, namely:

"WHEREAS, the undersigned as Senior Circuit Judge of the Second Judicial Circuit of the United States, is impowered and authorized by law, pursuant to the provisions of Title 28, Sec. 22 of the Code of Laws of the United States of America, if the public interest so requires, to designate and assign any Circuit Judge of the Second Judicial Circuit to hold a District Court within such Circuit; and

WHEREAS, the undersigned, as such Senior Circuit Judge, finds that the public interest requires
54 that Martin T. Manton, a Circuit Judge of the Second Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a District Court within such Circuit, it is hereby

ORDERED, ADJUDGED AND DECREED, that the said Martin T. Manton be and he hereby is designated and assigned to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932 and particularly to hear

55

and determine all applications and proceedings in the matter entitled, American Brake Shoe and Foundry Company *vs.* Interborough Rapid Transit Company, and for such further time as may be required to complete unfinished business.

Dated, New York, August 25, 1932.

MARTIN T. MANTON
Senior Circuit Judge for the
Second Judicial Circuit."

56

(11-a) Complainant is informed and believes, and therefore avers, that there was complete unity of thought and action on the part of the District Judges of this Court in relation to the Court Rule hereinabove quoted. That so far as complainant knows, there is no prohibition in effective Rules against the appointment of individuals as receivers in equity causes in proper cases, especially where special application is made therefor.

That no such application was made to the District Judge holding the motion part, and that there was no occasion or necessity for designating an additional or other District Judge to hear and act upon the application for the appointment of receivers of the Interborough, in addition to the District Judge sitting in the Motion Part at the time said application was made. That there was no question of public interest involved which called for the designation of an additional District Judge to sit in the equity suit entitled, American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company; in fact, complainant believes, and therefore avers, that the public interest plainly required full and complete compliance with the effective Rules, Practice and Procedure of this Court on account of the vast and important financial obligations involved.

57

58 *Bill of Complaint of Benjamin F. Johnson.*

The other order entered by said Circuit Judge on the same day (August 25, 1932), and filed in the office of the Clerk of this Court, reads as follows:

"In the United States Circuit Court
of Appeals
Second Judicial Circuit.

In the Matter of the Division of Business and Assignment of Cases for Trial in the Southern District of New York.	Order

59

Whereas, Martin T. Manton has been duly designated and assigned to hold a District Court of the United States for the Southern District of New York within this Second Judicial Circuit for a period of thirty days from this day; and

Whereas, Section 23 of the Judicial Code (March 3, 1919, c 231, sec. 23, 36 Stat. 1090) provides that 'In districts having more than one district judge, the judges may agree upon a division of business and assignment of cases for trial in said district; but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the district lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District'; and

60

Whereas, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court

in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business and assignment of cases for trial in the Southern District of New York, as provided in and pursuant to the rules of court for the Southern District of New York, heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby

ORDERED, ADJUDGED AND DECREED that, for a 62
period of thirty days beginning with this day, all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the District judge designated to hear such application pursuant to Rule 11-a of the General Rules of the District Court for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York.
Dated, New York, August 25, 1932.

MARTIN T. MANTON." 63

(12) Your complainant is informed and believes, and therefore avers, that the above designation and order are each irregular, improper, without legal warrant or justification, and void; moreover, that the action taken by Honorable Martin T. Manton in appointing the aforesaid receivers for Interborough and Manhattan were and are likewise irregular, improper and void, and that all orders made and the action taken by said Circuit Judge subsequent to the filing of the equity bill of the Inter-

borough are likewise null and void, as in violation of the rules, practice and procedure of this Court, and because said Circuit Judge lacked jurisdiction to entertain said receivership applications, and to make any orders, or to appoint said receivers, or to take any action whatever upon said bill, and therefore there is grave danger that in the near future, if not now, all of the proceedings taken by the Circuit Judge, and all of the action taken by the temporary receivers appointed as aforesaid will be set aside and declared to be null and void and of no effect, to the great detriment of complainant and of the creditors and security holders of the Interborough and Manhattan, with resulting irreparable damage to said parties, including complainant.

(13) That the interests involved and which are and will be affected by the irregular void and unlawful and improper action taken on the American Brake Shoe and Foundry Company bill (E. 70-364), and on the intervening bill of Manhattan, and of other intervenors, are so vast, and the certain likelihood of irreparable loss and damage is so great that this Court is importuned to direct a hearing in this cause at the earliest opportunity to insure against unnecessary loss and damage until the errors, irregularities and the jurisdictional defects hereinabove cited are properly cured. Complainant avers, there is involved in the Interborough and Manhattan receiverships, the rights of holders of First and Refunding Mortgage bonds of the Interborough dated March 20, 1913, to Guaranty Trust Company of New York as Trustee, under which there are now issued and outstanding in the hands of the public bonds to the principal amount of more than One Hundred and Thirty-two Million ($132,000,000.) Dollars, and under which there are now outstanding bonds to the additional amount of more than Fifty-four Million ($54,000,000) Dollars, pledged to

secure an issue of Ten Year Secured Convertible 7% Gold Notes of the said Interborough, due September 1, 1932, of which there are outstanding in the hands of the public notes to the principal amount of Thirty-one Million, Six Hundred and Seventy-two Thousand One Hundred ($31,672,100.) Dollars; that there are also issued and outstanding in the hands of the public Interborough's Unsecured Ten Year 6% Gold Notes due October 1, 1932, in the principal amount of Ten Million Five Hundred Thousand ($10,500,000.) Dollars; that interest on said First and Refunding Mortgage 5% Gold Bonds of the Interborough is due and payable on the first days of 68 January and July in each year; that interest on said Ten Year Secured Convertible 7% Gold Notes is due and payable on the first days of March and September in each year; and that interest on said Unsecured Ten Year 6% Gold Notes is due and payable on the first days of April and October in each year; also Seven percent (7%) per annum on the authorized and outstanding capital stock of said Manhattan Railway Company to the aggregate par value of Sixty Million ($60,000,000.) Dollars, payable quarterly to the owners of record of the shares of said stock, on the first days of January, April, July and October in each year, but as to 556,490 shares of said 69 capital stock the dividend rental rate has been reduced to 5% per annum, payable if earned; also Four percent (4%) per annum on the Consolidated Mortgage 4% Bonds of said Manhattan Railway Company of which Forty Million Six Hundred and Eighty-three Thousand (40,683.000.) Dollars, are now outstanding, payable semi-annually on the first days of April and October in each year; also Four percent (4%) per annum on the Second Mortgage Bonds of said Manhattan Railway Company of which Four Million Five Hundred and Twenty-three Thousand ($4,523,000.) Dollars, are now outstanding.

payable on the first days of June and December in each year.

(14) Your complainant is informed and believes, and therefore avers, that there is special and imperative need for having receivers for the Interborough and Manhattan who are independent and disconnected with the old management of said companies in order to insure adequate protection to their interests and that the appointment of the receivers aforementioned, as well as continuance in office of the President and General Manager of the Interborough, and the continuance in office of
71 the President and Counsel of the Manhattan, as receiver, or otherwise, does not and will not insure independence of action or protection, either of the Interborough or Manhattan creditors and security holders.

(15) Your complainant further avers, upon information and belief, that the designated attorneys for the receivers of Interborough, was the firm with whom Victor J. Dowling was associated at the time of his appointment as receiver; that said law firm, or certain members thereof, were and for years have been closely associated with the Brooklyn-Manhattan Transit Company, and during the period of one year prior to the date of August 26,
72 1932, said firm has directly or indirectly had professional and other connection with the subject-matter of this suit, and with the defendant Interborough, the Brooklyn-Manhattan Transit Company, and other persons interested in the cause or interested in the receivership estate. The Brooklyn-Manhattan Transit Company owns a large number of shares of Interborough, and its chairman of the board is also chairman of the board of the Interborough, while the companies also have common directors on the Brooklyn-Manhattan Transit Company, Interborough and Manhattan. That the Brooklyn-Manhattan Transit Company has never been favorable to Interborough, and even less so to Manhattan.

Bill of Complaint of Benjamin F. Johnson. 73

(15-a) That on August 29, 1932, a bill was filed together with an order to show cause returnable September 6, 1932, in the District Court for the Southern District of New York, entitled Harry Barber *vs.* Manhattan, Interborough, et al, wherein the plaintiff Harry Barber asked that a receiver be appointed for the Manhattan. That prior to said August 29, 1932, no proceeding, suit or action was instituted for the appointment of a receiver for Manhattan. That said bill was duly filed on August 29, 1932, and is now on file in the office of the Clerk of this Court. That on the return day of the said order to show cause, namely, September 6, 1932, and before the 74
time set for hearing thereon, it was announced by said Circuit Judge that William Roberts had been appointed temporary receiver of Manhattan by extending the American Brake Shoe and Foundry Company *v.* Interborough receivership over said Manhattan. That no action was taken by said Circuit Judge on the Barber bill of complaint, which was disregarded; that said appointment of William Roberts was made without the knowledge of any of the moving or intervening parties to the Barber bill and without any opportunity to be heard thereon. Petitioners believe said appointment of William Roberts was irregular, unlawful and improper.
The appointment by said Circuit Judge Manton of William Roberts, as receiver, before the Barber order to 75
show cause was formally heard on September 6, 1932, deprived the Manhattan security holders of a fair and impartial opportunity to be heard on the advisability of an absolutely and distinctly separate and independent receivership insofar as Manhattan interests were and are concerned.

(16) That said William Roberts was and is the President and Counsel for the Manhattan Railway Company, and it is believed that his appointment was sponsored and made at the instance of the Brooklyn-Manhattan

Transit Company-Interborough interests, and not at the instance or sponsorship of complainant or any of the other stockholders of Manhattan. Complainant believes, and therefore avers, that said appointment of William Roberts was irregular and improper. Moreover, that there is an urgent need of the appointment of a receiver for Manhattan who is familiar with the operating end of the elevated lines, and one who is independent, without connection with or domination by Interborough and/or Brooklyn-Manhattan Transit Company. Complainant believes that such independent receiver or re-
77 ceivers should be one well experienced in the operation of traction companies, as well as one thoroughly familiar with receiverships and reorganizations, and well grounded on finance and in the financial set up of Manhattan.

(17) That your complainant avers that petitions for intervention were filed in the Barber suit, the same having been consented to by the attorney for said Barber therein, but inasmuch as said Circuit Judge declined to take any action upon the equity bill filed in the Barber cause, except to order the same filed with the Clerk of this Court, the said petition of intervention was not
78 allowed, or filed in this Court.

(18) That there is further urgent necessity for the immediate appointment of new and independent receivers of Manhattan upon the grounds hereinafter set forth.

That Manhattan is a corporation organized and existing under the laws of the State of New York, owns a system of elevated railroads in the Boroughs of Manhattan and the Bronx in the City of New York, which system of railroads Manhattan leased to the Interborough for the term of 999 years from November 1, 1875, under the terms of conditions and for the rentals in said indenture of lease set forth. The lease includes four main parallel lines extending generally in a northerly and

southerly direction through the Boroughs of Manhattan and Bronx, in the City of New York, as follows:

Second Avenue Line, extending from Chatham Square along Allen Street, First and Second Avenues to 129th Street and Second Avenue;

Third Avenue Line, (including the so-called Suburban Line), extending from South Ferry in the Borough of Manhattan, along Pearl Street, the Bowery, Third Avenue to Pelham Bay Road in the Bronx, with an additional main line extending from Park Row at City Hall to Chatham Square and a branch known as the 34th 80
Street Branch, extending from Third Avenue and 34th Street to the East River;

Sixth Avenue Line, extending from Morris Street along Church Street, West Broadway, Sixth Avenue and West 53rd Street to a connection with the Ninth Avenue Line at Ninth Avenue and 53rd Street;

Ninth Avenue Line, extending from South Ferry, in the Borough of Manhattan, along Greenwich Street, Ninth Avenue, West 110th Street, Eighth Avenue and over the Harlem River and partly over a private right of way to a connection with the City-owned Lexington Avenue Subway Line at Jerome Avenue and 162nd 81
Street.

(19) On March 19, 1913, Public Service Commission issued a certificate to Manhattan, known as the "Manhattan Certificate" to construct additional or third tracks upon the Second Avenue Line, Third Avenue Line and Ninth Avenue Line for the entire distances along said lines as hereinabove described. Pursuant to the terms of the Certificate, the franchise for the third tracks is for a period of eighty-five (85) years at the expiration of which time the third tracks revert to the City of New York. The remaining tracks or lines are owned by Man-

hattan in perpetuity. Interborough claims to have constructed the third tracks and enlarged power station of Manhattan out of its own funds and to have expended in the construction of the third tracks sums variously estimated from Twenty-seven Million ($27,000,000.) Dollars to Forty Million ($40,000,000.) Dollars.

(20) In and by the aforesaid lease, the Interborough as lessee, covenanted and agreed that it would each and every year during the term of the lease of June 1, 1906, pay to Manhattan, as lessor, as rent for the demised
83 property, annual dividends at the time specified in the lease at the rate of 7% per annum on the shares of stock of Manhattan.

(21) That the Interborough, as lessee, covenanted and agreed to pay to the lessor, as rental, as the same became due the interest on the outstanding bonds of Manhattan.

(22) The Interborough, as lessee, covenanted and agreed that it would pay and discharge the rent as and when the same became due and all taxes, assessments and charges whatsoever levied, assessed or imposed upon the Manhattan as lessor, its capital, or shares of capital
84 stock, or dividends, or upon the demised railroad premises, real estate, personal property, franchises, assessments, or any part thereof, or the business, earnings or income of the lessor, or for the use or enjoyment thereof by the United States, State, Municipal, or other lawful authority.

(23) At the time the receivers were appointed for Interborough on August 26, 1932, there was outstanding the following securities of Manhattan required to be paid by Interborough under the terms of the lease:

> $40,683,000. principal amount of Consolidated Mortgage 4% Bonds, issued under and pursuant

to and secured by an indenture dated February 26, 1890, and a supplemental indenture dated June 13, 1899, between Manhattan and Central Trust Company of New York (now Central Hanover Bank and Trust Company), whereby there is mortgaged all of the railroad properties and certain other properties of Manhattan.

$4,523,000. of Second Mortgage 4% Bonds, issued under and pursuant to and secured by an indenture dated January 1, 1913, between Manhattan and the Equitable Trust Company (now the Chase National Bank of the City of New York) whereby there is mortgaged all of the railroads properties and certain other properties of Manhattan, but subject to the lien created by said indenture to Central Trust Company of New York (now Central Hanover Bank & Trust Company). 86

600,000 shares of the capital stock of the par value of $100.

(24) On May 1, 1922, a voluntary "Plan of Readjustment" was made in and by which it was provided that as to all holders of the capital stock of Manhattan who should assent to the Plan of Readjustment, the 7% annual rate of guaranteed dividend rental on such capital stock as fixed in the aforesaid lease from Manhattan to Interborough should be reduced subject to the terms and conditions of the Plan of Readjustment to the rate of 5% per annum after July 1, 1924, with the provision that in any fiscal year in which either the net earnings of the Interborough or the net earnings of the Manhattan leased line, as defined in the Plan of Readjustment, would be sufficient to pay the whole of said guaranteed dividend rental, the Interborough should pay and distribute as provided in the aforesaid lease on account of said dividend rental an amount equal to the net earnings of the Interborough Company or the net earnings of the Manhattan leased lines, whichever amount should be the larger. 87

88 *Bill of Complaint of Benjamin F. Johnson.*

(24-a) The complainant has made no demand upon the officers and directors of this corporation to institute proceedings for the relief herein sought for the reason that a great emergency exists for the immediate appointment of receivers of Manhattan upon the grounds that the receivers appointed for Interborough are appropriating the revenues from Manhattan on behalf of Interborough and are making no payments therefrom to Manhattan; that Manhattan has no funds of its own to meet obligations already due and owing, nor has it funds to meet payments to its bondholders which are presently
89 to become due and owing; that with such a condition Manhattan may be forced to terminate its lease with Interborough forthwith and attempt to operate its own road; that in such event, it will have no funds with which to carry on such operation; that the continued operation of through trains from the Manhattan tracks to the Interborough tracks and vice versa may be disrupted; that the public service may and is likely to become seriously impaired and endangered; that with the uncertainties which have arisen in the minds of the public and among the employees of Interborough and Manhattan, grave danger is apt to arise in connection with the operation of the high speed trains and the rapid transit conducted by both
90 roads; that assurances should be given to the public and employees of both roads forthwith that the operation of Manhattan as well as Interborough will continue as heretofore and that the roads operations will be under the exclusive jurisdiction of and direction of this Court; that no demand has been made upon the further grounds that Interborough having admitted in its answer that it is unable to meet the obligations due and owing from it to Manhattan and will be unable to meet the obligations due and becoming due from Interborough to Manhattan, various actions are likely to be instituted in different jurisdictions, including foreclosure actions and suits by stock-

holders and bondholders; that such actions will result in great confusion and complication and will endanger not only the rights of parties financially interested in Manhattan, but will cause great inconvenience and perhaps danger to the public as well; that this Court should forthwith take immediate jurisdiction of Manhattan so that exclusive control of the operation of both roads and the through and connecting lines of both roads shall be vested under one authority.

(24-b) Upon information and belief, as several of the directors of Interborough are also directors of Manhattan, and as heretofore alleged, three of the directors of 92
Interborough constitute three of the four members of the Executive Committee of Manhattan; that the interests of these directors are conflicting and that it is impossible for such directors, particularly those controlling the executive committee of Manhattan to act independently and adequately and fully to protect the rights of Manhattan as against Interborough when acting in such dual position; that various questions of the rights of Interborough and Manhattan must necessarily arise, particularly as to operating and maintenance costs and revenues, in connection with the operation of through trains from one line to the other; the determination and apportionment of 93
compensation to employees engaged in through train operations, the determination of the rights of Manhattan and Interborough on the extra trackage built by Interborough on Manhattan's roads and questions arising with respect to the liability of Interborough to Manhattan because of breaches of the lease by Interborough; the fixing of the rights of Manhattan as against Interborough in the event of unification, consolidation or merger of both roads; and the immediate determination by the Court acting upon the advices of independent receivers of both companies as to the proper disposition and allocation of the revenues received by the receivers in the operation of

94 *Bill of Complaint of Benjamin F. Johnson.*

Manhattan and Interborough; the determination as to what sums it shall be just and proper for the receivers of Interborough to pay to Manhattan's receivers; that such apportionment can best be done by having one jurisdiction over both properties.

(24-c) Complainant further avers upon information and belief, that the orders appointing receivers for the Interborough and Manhattan are void and of no effect whatsoever; that the acts of said receivers acting in a *de facto* capacity are likewise illegal, void and of no
95 effect; that the acts of such *de facto* receivers heretofore done and about to be done have created and will continue to create serious disputes involving the legality of their acts, thereby creating doubt and confusion as to the effect of all the action taken by them.

(25) It is the allegation of your complainant supported by Manhattan that the earnings of Manhattan or Interborough have been sufficient to make such payments and that a proper audit and accounting of Interborough's books and records and of the books and records kept by Interborough as to the operation of the Manhattan lines would prove your complainant's allegation.

96 (26) Your complainant alleges that the Interborough bondholders have no lien whatsoever upon the third tracks of the Manhattan and is supported in that allegation by the then counsel for the Manhattan stockholders' committee, Messrs. Murray, Prentice & Aldrich. It is your complainant's contention and it so alleges that the third tracks have become affixed to the property owned in fee by Manhattan, that such tracks were not subject to any claim of Interborough or its creditors or bondholders and that said trackage is subject (if it is subject at all) to the first or second Manhattan mortgages or both. Your complainant further alleges that if the lease between Manhattan and Interborough is disaffirmed or rejected by the receivers of Interborough all improvements and bet-

terments made by Interborough as lessee upon Manhattan's property inure to the benefit of the lessor as provided in paragraph numbered "ARTICLE TWENTY-FIRST" of the lease reading as follows:

> "ARTICLE TWENTY-FIRST: The Lessee further covenants and agrees that in case of default by it in the payment of the cash or dividend rentals in this lease reserved and agreed to be paid, and if said rentals, or any part thereof, shall remain unpaid for the space of ninety days from and after the time when they shall become due and payable, or if the said Lessee shall be in default in the performance of any of the covenants or agreements in 98
> this Lease contained and on its part to be kept and performed as aforesaid, and such default shall continue for the period of ninety days after notice and demand of performance by the Lessee, given in writing by the Lessor to the Lessee, or if the Lessee shall fail or refuse to comply with any decision of arbitrators appointed as herein provided, for sixty days after service of notice of such decisions upon it, *then and in any of said events, the term by this lease created, granted and demised shall at the option of the said Lessor expire and cease and determine, and the Lessor shall have the right to enter upon and take possession of all and singular the property by this lease granted and demised,* 99
> *and the same have and possess and enjoy as of its former estate, and without such entry may recover possession thereof in the manner provided by statute, by summary proceedings; it being covenanted and agreed that the term hereby granted shall expire after continued default as aforesaid, at the election of the Lessor and upon written notice of such election being served on the Lessee, and that all right of any further demand or reentry other than that above specifically referred to is hereby waived by the Lessee. The foregoing remedies are cumulative and shall not be construed to take away or abridge any other remedy, or right existing by law, or under any other provision of this Lease."* (Italics ours).

100 *Bill of Complaint of Benjamin F. Johnson.*

(27) Taxes in excess of $860,000. against the special franchises and real estate belonging to the Manhattan have become due and are now unpaid. In the complaint of American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, filed August 26, 1932 (paragraph 13) it is alleged as follows:

> "On information and belief, that the defendant has neglected and failed to pay certain taxes for 1932 duly assessed by the City of New York against the special franchises and real estate belonging to the Manhattan Railway Company, the amount of
101 such taxes with interest now due thereon being in excess of $860,000.; that defendant lessor Manhattan Railway Company has formally demanded in writing that such taxes be paid, but that the defendant has neglected and failed, and continues to neglect and fail to comply with such demand and make such payments; on information and belief that the failure and such refusal constitutes an act of default on the part of defendant under the aforesaid lease of Manhattan Railway Company, and if continued for a period of 90 days from the date of demand of the Manhattan Railway Company, will constitute an additional act of default under the terms of the First & Refunding Mortgage."

102 The foregoing allegation of the complaint is admitted by the answer thereto.

(28) In said American Brake Shoe and Foundry Company complaint (paragraph 15), it is alleged on information and belief that the defendant is and will be without financial resources to meet in full certain contractual obligations which are required of it by the terms of said mortgage, the indenture securing its notes and the lease of Manhattan which included the following:

> "Rental payments due under the lease from Manhattan Railway Company amounting to $914,802.50 on October 1, 1932, being interest on the

Manhattan 4% Bonds and rental for one-quarter on the non-assenting 7% stock of the Manhattan Company."

"Rental payments due under the said Manhattan lease on December 1, 1932, amounting to $90,460."

The foregoing allegation of said American Brake Shoe and Foundry Company's complaint is admitted by the answer thereto.

(29) In each of the two mortgages of Manhattan securing its outstanding bonds, there are provisions that, 104
on defaults in the payments of interest on the outstanding bonds and the continuance of such defaults for short period respectively, set forth in the said respective mortgages, proceedings may be instituted by the Trustees, respectively, named in the respective mortgages, and shall be instituted by the Trustees, respectively, upon the request of a specified number of holders of bonds secured by such mortgages, respectively, to foreclose the liens of the respective mortgages.

(30) The Interborough by the terms of the aforesaid lease agreed to pay interest on the bonds of Manhattan as it became due. Manhattan has no resources with which 105
to meet the interest on the mortgage indebtedness of its system of elevated railroads leased to Interborough, or to meet the other indebtedness or liability of Manhattan, other than the rentals payable under the lease made by Manhattan to Interborough as part of which said Interborough agrees to pay such fixed charges and such rentals and to perform the other covenants therein contained.

(31) The complainant alleges that Manhattan is in a very precarious position at this very moment because of the default by Interborough as lessee in the payment of real estate and franchise taxes owing by Manhattan on

106 *Bill of Complaint of Benjamin F. Johnson.*

its properties and which Interborough under its lease is required to pay as part of its rent to Manhattan.

(32) The complainant further is informed and believes, and alleges, that the Interborough has definitely stated the interest will not be paid to the Manhattan 4% bondholders on October 1, 1932.

(33) With the uncertainty as to the future of Interborough, now in receivership, and its claim that its present plight is due to losses incurred from the operation of the Manhattan lines and the frequent appearing state-
107 ments in the press and elsewhere that to save itself Interborough must cut loose from the Manhattan lines, there is grave danger that the Manhattan first or second mortgage bondholders, or both, will promptly declare the entire Manhattan mortgage indebtedness of approximately Forty-five Million ($45,000,000) Dollars due and payable and institute foreclosure or take possession of Manhattan's properties, in spite of the present receiverships of Interborough and Manhattan.

(34) That there is a grave and dangerous possibility of said receiverships of Interborough and Manhattan being set aside, inasmuch as Circuit Judge Martin T. Man-
108 ton had no power or jurisdiction to entertain said receivership proceedings, as was heretofore more fully set forth. That if the foreclosing mortgagees upon default in the payment of their interest on October 1, 1932, elect to foreclose, as they unquestionably will in order to set aside the present receiverships of Interborough and Manhattan because of the said irregularity, nullity and voidness in the procedure of obtaining said Interborough and Manhattan receivers, the Manhattan stockholders will be placed in a very dangerous, precarious and questionable position.

(35) If the Trustees or bondholders should set aside the Interborough and Manhattan receiverships on the

aforementioned grounds and institute foreclosure proceedings in the State Court and procure the appointment of receivers, hopeless confusion and chaos will result with various acts and receivers making over-lapping claims or seizing properties perhaps belonging to the other receivers, claiming the protection of the Court which appointed them and refusing to submit to the jurisdiction of the Court of the opposing receivers. The injury, damage and the inconvenience to the travelling public which has to use both lines will be incalculable and shameful. Such a possibility should not be tolerated by this Court or any other Court for a single instance and the possi- 110
bility of such a condition should be and can be removed at once by the immediate setting aside of the application and appointment of Victor J. Dowling and Thomas E. Murray, Jr., receivers of Interborough, and William Roberts, receiver for Manhattan, and by the proper presentation of a petition for receivers for Interborough and Manhattan before a District Court Judge for the Southern District of New York, having the recognized and proper jurisdiction to entertain such applications and make appointments of receivers thereof.

(36) There are further and very serious problems arising out of the Interborough-Manhattan receiverships 111
which require this Court to immediately nominate and properly appoint a new and independent receiver of Manhattan who is not only experienced in the intricate problem of the financial affairs of Manhattan but who is also experienced in the operation of said Manhattan lines.

(37) It is most essential that an accounting be had at once between the Interborough and Manhattan. At the present time questions arising daily as to what portion of the operating expense of the Interborough and Manhattan lines should be borne by Manhattan; similarly what portion of the revenue received through operation

over Interborough and Manhattan lines should be received by Manhattan; again the question arises what charge should be made to Interborough for the use of electricity from Manhattan's power stations. These questions should not be left to the determination of the Interborough receivers. Independent, new and proper representatives should be appointed by this Court to protect the rights of Manhattan on all such questions. It is reported that the revenue from the Manhattan lines is mingled with the revenue from the Interborough lines. Question arises whether these funds must not now be held
113 by the receivers for the benefit of Interborough creditors. Tracing Manhattan's revenues and segregating them from a common fund is an almost impossible task, unless an independent Manhattan receiver, well acquainted with transit finances, is placed in a position to receive all said moneys, rents and profits for Manhattan. It is respectfully prayed that the Court should take immediate action to segregate Manhattan's revenue from the funds of Interborough's receivers. Proper, new and independent receivers appointed for Manhattan will afford that protection to which Manhattan, its stockholders and bondholders are immediately entitled.

114 (38) The reports of the Interborough for the operation of the Manhattan lines and extensions show a steadily mounting deficit for the past eight (8) years totalling about Nineteen Million ($19,000,000.) Dollars as follows:

For the year 1925, loss....	$1,244,673.
For the year 1926, loss....	792,454.
For the year 1927, loss....	1,604,869.
For the year 1928, loss....	2,922,069.
For the year 1929, loss....	2,868,173.
For the year 1930, loss....	2,682,677.
For the year 1931, loss....	3,492,807.
For the year 1932, loss....	3,500,000. (estimated)

Of this amount approximately Ten Million ($10,000,000.) Dollars is an indebtedness upon Manhattan's Modified 5% stock the dividends of which are cumulative. No dividends have been paid on the Modified Stock for over three and one-half years. In addition, Interborough claims that it must set aside annually the sum of $3,185,000. for interest and sinking fund requirements on its bonds the proceeds of which were used to construct its extensions and for third tracking the Manhattan elevated lines.

(39) The published reports fail to segregate the operating revenue of the Manhattan lines from the Interborough extensions and the Interborough elevated extensions. So far as is known no report has ever been furnished to Manhattan or its stockholders showing what if any losses have been incurred in the operation of the Manhattan lines, although the lease of Manhattan to Interborough provides for such accounting at the expense of the Interborough. The matter is of transcendent importance inasmuch as the outlying and non-paying portions of the elevated extensions built by Interborough have been used as a single line with Manhattan leased lines. If the Manhattan lines apart from the extensions are responsible for part of this enormous deficit the Interborough receivers must promptly disaffirm the Manhattan lease. 116 117

(40) Your complainant further respectfully alleges and urges that this Court immediately appoint new and independent receivers for Manhattan, so as to provide for the continued operation of the Manhattan lines, and to furnish adequate transportation to the public and protect Manhattan, its stockholders and bondholders from irreparable loss including possible loss if its franchises of operation should be suspended. With the danger of the bondholders setting aside the present receiverships

by foreclosure of the Manhattan first mortgage because of the default in the non-payment of taxes and the threatened default on the interest upon its mortgage due on October 1st, amounting to over $800,000. and the admission by Interborough in its answer that it has no funds to meet this payment and that there are no sources to which it can turn to in the future to pay the same, Manhattan would be unable to borrow funds necessary to operate its lines and to train and pay the personnel necessary to carry on such operations if the receivers disaffirmed the lease. On the other hand, proper receivers
119 for Manhattan would by order of Court be enabled to borrow sufficient funds since receivers' certificates could as a matter of law be established as a prior lien on all of Manhattan's properties. Complainant herein alleges and avers that a Court of Equity may authorize the issuance of receivers' certificates for the operation of railways or other public corporations which shall be a prior lien over all mortgages and indebtedness of the company.

(41) Your complainant further prays for the immediate appointment of independent receivers of Manhattan upon the further ground that if the receivers of Inter-
120 borough operate the Manhattan lines at a loss such loss as a matter of law must be borne by Manhattan and would be chargeable to it. Manhattan should be left to its own destinies. Complainant believes that Manhattan confining their efforts to the affairs of Manhattan and concentrating only on Manhattan's problems should better succeed in their making profits for Manhattan or reducing its losses by operating independently of the Interborough's receivers who have the duty imposed upon them of watching out for Interborough's affairs primarily.

(42) The Court's attention is also called to another serious question in the event of a foreclosure proceeding

121

being instituted upon the setting aside of the present Interborough and Manhattan receiverships. As hereinabove pointed out, Interborough's bondholders claim a lien on the third tracks built in 1913 or thereafter on the Second, Third and Ninth Avenue lines of Manhattan and in addition thereto claim a lien for the improvements and enlargements made upon the Manhattan power stations in 1913 or thereafter. The amount asserted to have been expended by Interborough for construction of the third tracks and power house improvements is between $27,000,000. and $40,000,000. Interborough procured the funds for the purpose of making such expenditures from 122
the sale of Interborough bonds on or about the year 1913. The Manhattan first mortgage of which the Central Hanover Bank & Trust Company of New York is Trustee was executed by Manhattan on February 26, 1890, and was duly recorded and made a matter of public record at or about the same time.

(43) In the event of a foreclosure sale of Manhattan's properties the Manhattan bondholders under its earlier recorded mortgage would claim the third tracks and power house improvements free and clear of any claims of Interborough's bondholders; the Interborough bondholders, or the receivers for the Interborough, may 123
establish a prior lien of the third tracks for the benefit of the Interborough bondholders. It will be necessary for independent and properly appointed receivers for Manhattan to protect and uphold the rights of Manhattan in said power houses and said third tracks.

(44) Interborough attributes their losses (complainant believes erroneously) sustained in operation to the Manhattan lines and extensions. Mr. Hedley, President and General Manager of Interborough stated among other things to the Manhattan stockholders in 1922, that if a receiver were appointed for Interborough—

124 *Bill of Complaint of Benjamin F. Johnson.*

"2. Such receiver would not be permitted to pay the back 7% dividends nor indeed any rental for the Manhattan lines.

"3. Such receiver would therefore temporarily operate the lines in the public interest and the earnings would doubtless be impounded during such operation. No dividends would be paid during such period.

"4. The property would ultimately be surrendered by the receiver to its owners, the Manhattan
125 stockholders.

"5. The Manhattan Company would have to take its property and operate it to preserve its franchises from forfeiture."

Mr. Hedley's statements apply as well today as they did when he made them. Indeed the mounting losses of Interborough from the operation of the elevated division including the Manhattan lines, make his statements most significant at the present time now that Interborough and Manhattan are in need of receivership. Interborough's receivers are in duty bound to protect its security holders and stockholders from further heavy
126 losses. Interborough can in all probability be saved from further loss by the disaffirmance of the lease. There is, therefore, in view of the premises an imperative, urgent and immediate need of an independent and proper receiver and/or receivers being appointed to protect the interests of Manhattan.

WHEREFORE, complainant files this bill of complaint on behalf of itself and all other stockholders for the benefit of the Corporation, and prays

1. That the designation of Hon. Martin T. Manton, Circuit Judge, dated August 25th, 1932, appointing him-

self as District Judge for the purpose of hearing the application for a receiver of the Interborough Rapid Transit Company be vacated and set aside.

2. That the order of Hon. Martin T. Manton, Circuit Judge, dated August 25th, 1932, appointing himself as an additional District Judge to hear all applications for the appointment of receivers in equity causes in the Southern District of New York, be vacated and set aside.

3. That this Court vacate and set aside the order entered August 26, 1932, appointing Victor J. Dowling 128
and Thomas E. Murray, Jr., as temporary receivers for the Interborough in the American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, et al. (E. 70-364) upon the ground that said Circuit Judge was without jurisdiction to entertain said petition for receivership or to make the order of appointment of said receivers.

4. That this Court vacate and set aside the order made September 6, 1932, appointing William Roberts, as temporary receiver for Manhattan in the American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, et al, on the ground that said Circuit 129
Judge was without jurisdiction to entertain the petition of Manhattan Railway Company, or to make said order for the appointment of said receiver.

5. That this Court appoint independent receivers for Interborough who are disassociated with either the Brooklyn-Manhattan Transit Company, or the Interborough Rapid Transit Company, and their respective officers, bankers or counsel.

6. That this Court appoint independent receivers for Manhattan, who are familiar with the operations, track-

130 *Bill of Complaint of Benjamin F. Johnson.*

age and financial status and commitments of Manhattan, and versed by experience with problems of re-organization and refinance, to the end that the interests of complainant and all others similarly situated, and the creditors and other security holders of Manhattan, may be properly represented and protected.

7. That the attorneys and counsel appointed for such receiver and/or receivers of the Interborough shall have no connection of whatsoever kind or nature with the Manhattan or Brooklyn-Manhattan Transit Company, or with
131 their officers, bankers, attorneys and counsel.

8. That the counsel appointed for such receiver and/or receivers of the Manhattan shall have no connection of whatsoever kind or nature with the Interborough or Brooklyn-Manhattan Transit Company or with their officers, bankers, attorneys and counsel.

9. That an account shall be taken of all sums due and owing to Manhattan by Interborough.

10. That there shall be fixed and determined the amount to be paid by the receiver or receivers of Interborough to Manhattan for the use, occupation and oper-
132 ation of the properties, trackage facilities, railroad facilities, cars, equipment, power, compensation of employees and all other items properly chargeable to the receiver or receivers of Interborough.

11. That the damages caused by the breach of the lease between Manhattan and Interborough shall be fixed and determined, or in the alternative, that the court shall decree specific performance of the lease between Interborough and Manhattan.

12. That the court shall determine the respective rights, duties, obligations and liabilities of Manhattan and Interborough and shall enter such order, decree and judgment as shall seem equitable and meet in the premises.

13. That this Honorable Court will forthwith appoint separate and independent receivers of all and singular the property and assets of every nature, wheresoever situated, held, owned or controlled by Manhattan and by Interborough, respectively, with full power and authority to take into their respective possessions, hold, manage 134
and operate the business and properties of the defendants, Interborough and Manhattan, respectively, and receive and collect the rents, issues and profits thereof, with such powers as this Honorable Court may from time to time grant, including the power to borrow money on receiver's certificates or otherwise, and for that purpose to incur such expenses as may be necessary or advisable in connection therewith, to purchase and sell, for cash or on credit, such merchandise, supplies, equipment, materials or other property as may be necessary or advisable in connection with the administration of the assets of Manhattan and of Interborough, respectively, and the continuation of their respective business to such extent as may 135
be authorized by this Honorable Court; to bring suit for, collect, receive and take into their respective possessions all the property and assets, real, personal or mixed, goods, chattels, credits, rights, claims and equities, books, papers, securities, cash and other property whatsoever and wheresoever situated; and in continuing, managing and operating said businesses, so far as authorized by this Honorable Court, to act in association with any receiver or receivers who may be appointed by any other

court to take possession of and operate any property of the same defendant situated outside the jurisdiction of this court, and to that end to transfer and consent to the transfer from time to time of such raw materials, materials in process, finished products, moneys and credits to and from this jurisdiction and any such other jurisdiction for the purpose of said business to the extent that the conduct thereof may from time to time reasonably require, and to cooperate to the fullest extent with any such other receiver or receivers in continuing, managing and operating said business, so far as authorized by this
137 Honorable Court, as a whole, and in arranging for and making such transfers; to appoint and employ such managers, agents, employees, servants, accountants, attorneys and counsel as may in his or their judgment be advisable or necessary in the management, conduct, control or custody of the affairs of the defendants and of the assets thereof, and to make such payments and disbursements as may be needful or proper for the purposes aforesaid or otherwise for the preservation and operation of the properties of Manhattan and of Interborough, respectively, so far as authorized by this Honorable Court, including authority to make payment of debts entitled to priority and of the wages and salaries of agents, employ-
138 ees, laborers and servants of said Manhattan and of Interborough, respectively, accrued or to accrue, which are entitled to priority by statute or which said receiver or receivers shall deem to be necessary or expedient to pay to secure the continuation of their services or to avoid detriment to the working organization of the business; to institute, prosecute and defend, compromise, adjust, intervene in or become a party to suits, actions, proceedings at law, in equity, or in admiralty, including ancillary proceedings in state or federal courts or courts of foreign nations, and likewise to defend, compromise or adjust, or

otherwise dispose of any or all suits, actions or proceedings instituted against him or them as receiver or receivers or against Manhattan or Interborough, respectively, and also to appear in and conduct the prosecution or defense of any suit or adjust or compromise actions or proceedings now pending in any court by or against Manhattan, or Interborough, respectively, and to compound and settle with all debtors of said defendants, respectively, with persons having possession of their respective properties or in any way responsible at law or in equity to Manhattan, or Interborough, respectively, and with the further usual powers of receivers in such cases; and that 140 the officers, managers, superintendents, agents, attorneys, and employees of Manhattan and of Interborough, respectively be required forthwith to deliver up to said respective receivers the possession of all and every part of the properties of the defendants Manhattan and Interborough, respectively, wheresoever situated, including the several books, vouchers and papers in any way relating to the business or corporate proceedings of the said defendants, respectively.

14. That this Honorable Court administer all and singular the property rights and business belonging to Manhattan and Interborough, respectively, and adjudi- 141 cate, enforce and adjust the rights, liens, equities and claims of all the creditors of the said defendants, including the claim of complainants, as the same may be determined, and adjust the rights between Manhattan and Interborough.

15. That all creditors, stockholders and other persons be enjoined permanently and pendente lite from instituting or prosecuting or continuing the prosecution of any actions, suits or other proceedings at law or in equity or under any statute against Manhattan and/or Inter-

borough, respectively, and from levying any attachments, executions or other processes upon or against any of the properties of Manhattan and/or Interborough, respectively, and from taking or attempting to take into their possession any part of the property of Manhattan and/or Interborough, respectively, and from doing any act whatsoever to interfere with the possession of and management by the said respective receivers of the properties of Manhattan, and Interborough, respectively, or in any way to interfere with the said receiver or receivers in the discharge of his or their duties, or to interfere in
143 any way with the administration and disposition in this suit of the affairs and properties of Manhattan and Interborough, respectively.

16. That all creditors of Manhattan and of Interborough, respectively, and all persons interested in Manhattan and or Interborough, be permitted to intervene in and become parties to this suit if and as permitted and authorized so to do by this Honorable Court.

17. That this complainant shall have such other and further relief as to the court may seem just and equitable in the premises together with the costs of this action.

144

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Attorney for Complainant,
Office & Post Office Address,
165 Broadway,
Borough of Manhattan,
New York City.

LOUIS BOEHM
Of Counsel

145

Supplemental Bill of Complaint of Benjamin F. Johnson.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

146

IN EQUITY
E 71-153-1932

147

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

Your petitioner, Benjamin F. Johnson, by his solicitor, Charles Franklin, praying to this court for the appointment of a receiver or receivers of MANHATTAN RAILWAY COMPANY (hereinafter called "Manhattan") and for the Interborough Rapid Transit Company, supplements his petition dated September 20, 1932, annexed to the order to show cause why such receivers should not be ap-

148 *Supplemental Bill of Complaint of Benjamin F. Johnson.*

pointed, signed by United States District Judge Francis G. Caffey, and returnable on October 4, 1932, at 10:30 o'clock in the forenoon, in Room 235 of the Old Post Office Building, Borough of Manhattan, New York City.

I. In addition to the interest of complainant who has instituted this suit in his derivative right as a stockholder of Manhattan Railway for the benefit and protection of Manhattan and all stockholders similarly situated, including bondholders and all others financially interested in said company, petitions for intervention have been
149 filed on behalf of Manhattan Railway Company stockholders Protective Committee, representing in excess of $10,500,000. of the Manhattan Modified Stock, as well as petitions of intervention by other stockholders and bondholders of the Manhattan and Interborough Companies in excess of $5,000,000. Your petitioner is informed that other shareholders and bondholders of Manhattan and Interborough will join in the prayers for the appointment of receivers.

The defendants above-named have been duly served with copies of the bill of complaint, and the aforesaid order to show cause and the defendant, Manhattan, In-
150 terborough and the Receivers thereof were also served with copies of the order of this court authorizing that they be made parties defendant in this suit.

II. There is urgent necessity for the immediate appointment of receivers of Manhattan and Interborough upon the grounds in the original bill and hereinafter set forth.

III. The interest required to be paid by Interborough upon Manhattan's obligations is four (4%) per cent per annum on Forty Million Six Hundred and Sixty-three

Thousand ($40,663,000) Dollars Consolidated First Mortgage Bonds due in 1990 held by the Central Hanover Bank and Trust Company as Trustee, said interest amounting to approximately $800,000, became due and payable on October 1, 1932; that the same was not paid and there is now, therefore, a default under said mortgages entitling the trustee thereunder, or a committee of bondholders to foreclose the lien of said mortgage, in the State or Federal Court, unless this Court takes judicial custody of the properties of Manhattan Railway Company, and appoints a Receiver therein.

152

IV. The said Manhattan first mortgage indenture under which the Central Hanover Bank and Trust Company is trustee provides under Paragraph "Ninth" thereof that "Manhattan shall promptly pay all taxes, assessments or other like charges lawfully laid, charged or imposed upon the mortgaged premises or any part thereof, including the property represented by any stocks, bonds or other like muniments or evidence of ownership deposited with or held by the Trustee as aforesaid, *which may become prior to the lien of* these presents;".

V. Paragraph "Third" of the indenture provides:

153

> "That upon any and every such default in the payment of any interest of the bonds hereby secured or of any of them, and its continuance as aforesaid, or upon any and every such default by said Railway Companies or either of them in any other act or thing herein required to be kept, done or performed by them or either of them, the holders of a majority in amount of the bonds hereby secured at the time outstanding may, by writing to be delivered to the Trustee, declare the principal of all the bonds hereby secured to be, and the same

154 *Supplemental Bill of Complaint of Benjamin F. Johnson.*

shall thereupon become, immediately due and payable; and upon any and every such default in the payment of any interest of the bonds hereby secured, or of any of them and its continuance as aforesaid, or upon any and every default in the payment of the principal of any of the bonds hereby secured as herein provided, or upon any and every such default by said Railway Companies or either of them in any other act or thing herein required to be kept, done or performed by them or either of them, then and in every such case the
155 Trustee may, and, upon the request in writing of the holders of a majority in amount of the bonds hereby secured at the time outstanding, and upon being indemnified to its satisfaction against all costs and expenses to be incurred by it in complying with such request, the Trustee shall, with or without entry as aforesaid, proceed to sell and shall sell to the highest bidder therefor at public auction in the City of New York, the right, title, interest and estate of the Manhattan Company of, in and to the mortgaged premises, as an entirety, after first giving notice of the time and place of such sale by advertisement thereof in two or more
156 newspapers published in the City of New York not less than twice a week for the three weeks preceding such sale and, upon such sale, as the attorney in fact of the Manhattan Company, to convey, transfer and assign to the purchaser or purchasers the mortgaged premises so sold, and apply the proceeds of such sale, after first paying thereout all its costs and expenses of such sale, to the payment of all moneys due upon said bonds for principal and interest, etc."

VI. Paragraph "Fourth" provides an alternative remedy for the trustee to institute foreclosure proceedings. This right however is not limited to the trustee but permits the bondholders to institute foreclosure as follows:

> "No holder or holders of a bond or bonds hereby secured or of any interest coupons thereof shall have the right to institute any suit, action or proceeding in equity or at law for the foreclosure of these presents or the execution of the trusts hereof or for the appointment of a receiver of the premises hereby mortgaged or any part thereof, without having first given notice in writing to the Trustee of the fact that the default has occurred and requested the Trustee to proceed with all lawful remedies, and afforded it a reasonable opportunity to proceed to exercise the powers granted to it by these presents and to institute such suit, action or proceeding in its own name as may in its judgment be adapted to that end, but the Trustee may in all such cases, if so advised, require, and need not proceed until it shall have received, indemnity satisfactory to it against all expenses and liabilities to be incurred by it, before complying with such request, and no one or more holders of said bonds or coupons shall have the right, in any manner whatever, to enforce, affect, disturb, impair or prejudice the lien of these presents by his or their action, except through or by means of the concurrent action of the holders of a majority in amount of said bonds at the time outstanding as in these presents provided."

158

159

VII. No period of grace is provided in the indenture to make good a default in the payment of taxes before

160 *Supplemental Bill of Complaint of Benjamin F. Johnson.*

action may be taken by the bondholders or the trustee. A multiplicity of suits is now possible under the terms of the indenture. Such suits could be brought in the State Courts and in the case of the trustee, being a New York Corporation, it would be obliged to institute suit in the State Court inasmuch as Manhattan is also a New York Corporation.

VIII. The following issues are bound to arise and will require judicial determination. If the Manhattan bondholders or trustee under the indenture institute foreclosure proceedings in the State Court, because of the
161 default in the non-payment of Manhattan's taxes, this court having taken no action to appoint receivers for Manhattan, the State Court receivers will forthwith take possession of all of the Manhattan lines, rolling stock, equipment, power stations, etc. will undertake to operate the lines and collect and retain all of the fares paid at the Manhattan stations. They may declare Interborough's lease from Manhattan forfeited by virtue of Interborough's breach of the covenants of the lease and discontinue all service from the Interborough lines to the Manhattan lines and vice versa and cut off the power now being supplied by Manhattan's power stations to
162 certain of the Interborough lines. Such an occurrence would cause great hardship and inconvenience to the public in such an event.

For example: (a) The Manhattan Ninth Avenue line which terminates at 162nd Street and Jerome Avenue now carries passengers over an elevated extension built by the Interborough extending from 162nd Street and Jerome Avenue to the Woodlawn Cemetery at about 242nd Street. These passengers are carried at a single fare. State Court receivers of Manhattan would not have power to transmit the travelling public in a northerly direction beyond 162nd Street. State Court re-

ceivers could refuse to take aboard passengers at 162nd Street and Jerome Avenue who had come to that station from the Jerome Avenue extension without their paying an additional fare to the State Court receivers. (b) Passengers travelling in a northerly direction on the Manhattan Third Avenue line who are now permitted to travel for a 5¢ fare as far as White Plains Road over the Webster Avenue extension of Interborough which connects with the Manhattan Third Avenue line at Third Avenue and Pelham Bay Road, would, under State Court receivership be permitted to travel only as far as Pelham Bay Road and would be compelled to get out at that point, 164 board an Interborough train proceeding north over the Webster Avenue extension and pay an additional fare. At the present moment a passenger pays one single 5¢ fare and remains on the Manhattan train which proceeds today from its own lines directly over the Webster Avenue extension of the Interborough. Likewise passengers boarding the Webster Avenue extension and travelling in a southerly direction and desiring to continue on the Manhattan Third Avenue line into New York City would have to leave the Interborough train at Pelham Bay Road, board a Manhattan train at that point and pay an additional fare. (c) A similar situation would arise at 165 143rd Street and Third Avenue where passengers are now permitted to leave the Manhattan train and board one of the Interborough trains at that point to proceed for one fare over the Westchester Avenue extension also built by the Interborough road. In the event of a cancellation of the Manhattan lease by the State Court receivers, the passengers would be required to pay an additional fare and so upon the passengers return when travelling in a southerly direction. (d) A like situation is possible at 59th Street and Second Avenue. A passenger at the present time boarding a Second Avenue

train to go to Queens can board a Manhattan Second Avenue train and travel over the Queensboro extension to Queens for a single fare. If the Queensboro extension built by the Interborough was cut off by Manhattan's receivers a passenger would be required to pay two fares and vice versa when travelling from Queens to New York City.

If under the law of Public Service Corporations Interborough bondholders or the receivers for Interborough may succeed in establishing in the Federal Court a prior lien on the third tracks for the benefit of Interborough's
167 bondholders, two opposite adjudications of courts of concurrent jurisdiction are again possible.

It has been contended for many years and the claim is now made by persons financially interested in Manhattan that even if Interborough's bondholders have a lien prior to the Manhattan bondholders the amount thereof is many million dollars less than Twenty-seven Million ($27,000,000) Dollars and that the moneys paid for the construction of the third tracks was realized from the sale of Manhattan second mortgage bonds which were issued in or about the year 1913. Both the State and Federal Courts may have the jurisdiction to pass on these questions and it is possible that the decisions of the two
168 courts may reach opposite conclusions.

The foregoing are not idle or moot questions stated for the purpose of alarming the court. They are vital questions affecting the future of both companies and must sooner or later be answered by some court of competent jurisdiction. The amounts involved on each issue will probably run into many millions of dollars. The public interest is seriously involved in most, if not all of the issues raised.

Your petitioner and complainant and the other stockholders and bondholders who have intervened, and in the

interest of orderly procedure so as to avoid a travesty on our courts and in the interest of the public, respectfully renew their prayers for the immediate appointment of receivers of Manhattan and Interborough.

IX. Upon the foregoing grounds and upon the grounds hereinafter stated, your petitioner prays that the receivers to be appointed for Manhattan and Interborough and that the counsel appointed for such receivers shall have no connection of whatsoever kind and nature with Interborough or Brooklyn Manhattan Transit Company or with their officers, directors, stockholders, 170
bondholders or any committee or committees or counsel representing committees acting on behalf of persons or corporations financially interested in any respect with Interborough or Brooklyn Manhattan Transit Company.

The charge has been made and has been freely circulated in the public press, in financial magazines and in statistical publications that Interborough has planned for sometime past to drop its lease with Manhattan and that the purpose of placing itself under the jurisdiction of an equity court was that this result may be accomplished through the appointment of receivers of Interborough who as such would have the power to disaffirm 171
the Manhattan lease. The public as well as persons financially interested in Manhattan are seriously concerned if such a step is to be taken. In order that the receivers of Interborough may not be charged with unfairness or disregarding the interests of the public in the event they deem it necessary or prudent to disaffirm said lease, receivers should immediately be appointed to protect the interests of Manhattan and be prepared to continue the operation of its lines if the lease is disaffirmed. With independent receivers acting for Manhattan and with independent receivers acting for Interborough and

172 *Supplemental Bill of Complaint of Benjamin F. Johnson.*

with this court having jurisdiction over both sets of receivers and all of the properties of both companies, disputed issues may be immediately determined by the court and the respective receivers can carry out the court's mandates without hindrance or delay. With all parties before it and having exclusive jurisdiction as to all matters, this court can best protect the interests of the public and all other parties.

X. Your petitioner on behalf of the complainant and the others above-named prays that this court exercise its
173 chancery powers to protect Manhattan in its present crisis and prevent a forfeiture of its franchise and its lease and its very valuable easement rights. It has been estimated that the removal of the elevated structures on Sixth and Ninth Avenue lines alone would increase assessable property along and adjacent to the line by from One Billion ($1,000,000,000) Dollars to One Billion Five Hundred Million ($1,500,000,000) Dollars which would provide an annual increase in tax revenues to the City from that source of Twenty-five Million ($25,000,000) Dollars. This revenue is the equivalent of five (5%) percent on Five Hundred Million ($500,000,000) Dollars which would probably be a sum sufficient to purchase all
174 of the transit systems in the City of New York. An example of the value to the City of the removal of the elevated roads is the increase in property values from Seventeen Million ($17,000,000) Dollars to Seventy Million ($70,000,000) Dollars from 43rd Street to 59th Street on Sixth Avenue when the elevated spur between those two points was removed. It was the opinion of Samuel Untermyer, Esq., former counsel to the Transit Commission, that the Manhattan stockholders should receive Sixty ($60.00) Dollars per share under the proposed unification plan. Others expressed the opinion that the

shares of Manhattan based on the value of its easement rights alone are worth up to Three hundred ($300.00) Dollars per share. With such valuable easement rights and also the right to Manhattan to procure a 7¢ fare it is respectfully urged that this court appoint receivers of Manhattan immediately to save these valuable rights. A suspension of operation of Manhattan's lines or a foreclosure by the first mortgage bondholders in the State Court may completely destroy the value of the stockholders' equity in Manhattan. The present book value of their shares is approximately One Hundred ($100.00) Dollars per share or Sixty Million ($60,000,000) Dollars. Your petitioner prays that the Court follow the recognized practice in equity and appoint receivers for Manhattan.

XI. Petitioner avers that three of the four members of the Executive Committee of Manhattan dominating and controlling said Committee, are directors of Interborough. Mr. Charles L. Hayden a director of Manhattan is also a director of Interborough and is a director of the Brooklyn Manhattan Transit Company. Manhattan has been under the domination and control of Interborough ever since it took over Manhattan's properties lock, stock and barrel in 1903. Despite the protest of the holders of Manhattan modified stock that sufficient earnings have been made to pay dividends to them during the past few years, no accounting has ever been procured by Manhattan's directors or its Executive Committee from Interborough to ascertain the exact status of operations of the Manhattan lines, although Manhattan's lease specifically provides that it may employ accountants at Interborough's expense to ascertain the earnings from the Manhattan lines. Paragraph "VIII" of the lease provides:

178 *Supplemental Bill of Complaint of Benjamin F. Johnson.*

"For the protection of the Manhattan Company in respect of accounting methods and the determination of earnings and the distribution of earnings between the two divisions, it is to be provided that in case the Board of Directors of the Manhattan Company should be dissatisfied with the accounting methods of the Interborough Company for any period, then, at the instance of the Manhattan Company, independent certified public accountants (chosen by agreement or by some neutral party like the President of the Cham-
179 ber of Commerce), shall be called in, at the expense of the Interborough Company, to examine the accou its for that period. If the accountants should report the amounts that should have been paid by the Interborough Company to the Manhattan Company as rental to be greater than the payments actually made or that payment should thereafter be made upon a higher basis, the Interborough Company shall make payment accordingly."

The members of the Executive Committee of Manhattan in control who are also directors of Interborough
180 have so far as is known taken no steps whatever to protect Manhattan from default under its first mortgage caused by Interborough's failure to pay Manhattan's taxes. Manhattan became a mere shell under the lease arrangements made with Interborough and has continued a mere shell since 1903. It has no personnel to operate a transit system and if its properties were thrust back upon it, it would have neither trained executives to operate them nor as above pointed out, could it procure funds to do so. Complaint has been made from time to time against Interborough for failure to operate steel cars

over the Manhattan lines as it does upon its own lines. The Manhattan stations and properties are dilapidated in appearance compared with stations and properties of the Interborough. There is a specific duty imposed upon Interborough under this lease with Manhattan to keep the properties in good condition and repair "*so that the business of said demised railways shall be preserved, encouraged and developed, the business thereof done with safety and expedition, and the public accommodated as respect thereto, with all practicable conveniences and facilities.*" (From Article IX of the lease dated January 1, 1903) Notwithstanding this provision Manhat- 182
tan's officers, directors and its Executive Committee have failed to compel Interborough to carry out these provisions of the lease. The failure to provide comfortable and modern cars, the failure to provide steel cars for safety, the failure to keep up the appearances of the stations and the property, have all re-acted to the detriment of Manhattan and to the corresponding benefit of Interborough in that passengers seeking safety and more convenient cars have used the subway lines rather than the elevated lines. With the domination and control which Interborough has over all of Manhattan's properties and the failure and neglect on the part of Manhattan's Executive Committee the majority of whose mem- 183
bers serve as directors of Interborough to protect Manhattan's legal rights under the terms of the lease, this court should immediately step in and provide that protection to Manhattan and its vast body of bondholders and stockholders which the Manhattan directors have neglected and failed to do. Interborough has treated Manhattan as a step-child and for years it has sacrificed Manhattan's interest for its own advancement and financial benefit, flagrantly violating its legal obligations to it. Manhattan's directors have permitted these viola-

184 *Supplemental Bill of Complaint of Benjamin F. Johnson.*

tions to carry on and have failed in their duty as fiduciaries to Manhattan either to make recovery for the damages done to Manhattan or to prevent further injustices to Manhattan. A serious crisis has been reached in Manhattan's affairs and its very existence is threatened. If the court fails to appoint receivers for Manhattan now it will be forced to suspend operations upon the disaffirmance of the lease by the Interborough receivers. The harm and injury to the public will be incalculable and those financially interested in Manhattan, particularly the stockholders will probably lose their entire in-
185 vestment.

XII. That since the service and filing of petitioner's bill and the service and filing of the order to show cause granted herein, asking that the orders of Circuit Judge Manton appointing receivers of Interborough and Manhattan be vacated and set aside, and that all parties to the American Brake Shoe and Foundry Company bill be stayed pending the hearing and determination of the motion from applying to have the receiverships made permanent, and for the other relief therein requested, the said Circuit Judge has issued the following additional orders, namely:

186 "This cause came on to be heard at this term and therefore, upon consideration thereof,

It was Ordered, Adjudged and Decreed as follows:

1. The receivership of the defendant Interborough Rapid Transit Company and of all its property and assets, and the extension of such receivership to defendant Manhattan Railway Company and of all its property and assets, are hereby continued during the pendency of this cause; Victor J. Dowling and Thomas E. Murray Jr. are

hereby continued as Receivers of the defendant Interborough Rapid Transit Company and of all its property and assets during the pendency of this cause, with all the powers heretofore granted said Receivers by the order of this Court entered herein; and William Roberts is hereby continued as Receiver of the defendant Manhattan Railway Company and of all its property and assets during the pendency of this cause, with all the powers heretofore granted said Receiver by the order of this Court entered herein September 6, 1932, appointing him Receiver of Manhattan Railway Com- 188
pany and by any other orders heretofore entered herein.

2. All other terms and provisions of said order entered herein August 26, 1932, and of said order of September 6, 1932, and all other orders entered herein are continued during the pendency of this cause, until the further order of this court.

3. The bonds of the said Receivers, Victor J. Dowling and Thomas E. Murray Jr. in the sum of $100,000. each heretofore given by each of said Receivers in accordance with said order of this Court entered herein August 26, 1932, shall stand, 189
and said bonds are hereby approved and shall be and be deemed to be the bonds of such Receivers acting pursuant to this order, and said Receivers are hereby authorized to pay the premiums on said bonds out of the receivership estate of Interborough Rapid Transit Company.

4. The bond of the said Receiver, William Roberts, in the sum of $100,000 heretofore given by said Receiver in accordance with said order of this Court entered herein September 6, 1932, shall stand, and said bond is hereby approved and shall be and be deemed to be the bond of said Receiver

190 *Supplemental Bill of Complaint of Benjamin F. Johnson.*

acting pursuant to this order, and said Receiver is hereby authorized to pay the premium on said bond out of the receivership estate of Manhattan Railway Company.

5. Any application or petition for orders or instructions or otherwise in this cause shall be made to the undersigned in chambers or otherwise, the undersigned hereby reserving full right and jurisdiction over this cause and any and all proceedings herein.

6. The September 1932, equity term of this
191 court is extended until after the complete execution and carrying out of this order and decree, and until after the final determination and disposition of all matters herein reserved for future determination or action by this court. Said equity term is extended, in any event, for a period of three years from the date of this order or decree, with leave to any party to the above-entitled cause at any time prior to the expiration of said period of three years to apply to this court reserving full jurisdiction over the parties to the above-entitled cause and over the property and assets of the defendant, Interborough Rapid Transit Company
192 and of the defendant, Manhattan Elevated Railway Company, and reserves for later adjudication or other action any and all matters which in due course may come before this court for determination and for that purpose the term of the court is hereby extended.

Dated, New York, September 28th, 1932.

MARTIN T. MANTON
United States Circuit Judge designated to hold a session of the District Court, for the Southern District of New York."

 193

Petitioner is informed and believes and therefore avers that the above quoted order extending the September, 1932, equity term of this Court for a period of at least three years from the date thereof, and continuing the receiverships of the Interborough and Manhattan during the pendency of the American Brake Shoe cause, was and is irregular, improper, null, void, and of no legal effect, upon the jurisdictional grounds in the original bill and herein set forth, and that the said order and all acts taken by said Circuit Judge from the inception of the proceeding should be declared null and void and vacated and set aside.

194

XIII. That since the filing of the bill of complaint in this cause, the defendant Interborough Rapid Transit Company has defaulted in the payment of principal and interest due October 1, 1932, upon its $10,500,000. of 6% Notes, in addition to said defendant's default in the payment of principal and interest upon its $31,672,100. of Convertible 7% Notes due September 1, 1932, although petitioner is informed and believes, and therefore avers, that said defendant Interborough took no steps and made no efforts to prevent the receivership, but on the contrary, maintained during the entire period of depression in this country, and up to the time of its consent to the 195
receivership, the high scale of salaries and wages to its officers and employees, and were needlessly wasteful, extravagant and careless in other relations to such an extent as seriously to impair its credit, without any real or determined effort to refinance its maturing obligations hereinabove mentioned which is said to have precipitated the receivership.

Wherefore, your petitioner renews his prayers on behalf of the complainant and all of the stockholders and bondholders above-named as well as on behalf of all

196 *Supplemental Bill of Complaint of Benjamin F. Johnson.*

others intervening in this action that the Court grant the prayers of the bill of complaint as herein supplemented, and make the appointments of receivers prayed for; and that this Court also vacate and set aside all other orders or rulings made by Hon. Martin T. Manton, Senior Circuit Judge, since the filing of complainant's original bill.

BENJAMIN F. JOHNSON,
By (Signed) CHARLES FRANKLIN,
Solicitor.

(Signed) CHARLES FRANKLIN,
197 Attorney,
Office & Post Office Address,
No. 165 Broadway,
Borough of Manhattan,
LOUIS BOEHM, New York City.
Of Counsel.

198

199

Supplemental Subpoena.

E71-153

THE PRESIDENT OF THE UNITED STATES TO

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers, of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN 200
BRAKE SHOE AND FOUNDRY COMPANY,

GREETING:

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a Supplemental Bill of Complaint exhibited against you in the said Court in Equity, by

BENJAMIN F. JOHNSON

201

and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two HUNDRED AND FIFTY ($250.) DOLLARS.

WITNESS, HONORABLE JOHN C. KNOX, Judge of the District Court of the United States for the Southern District of New York, on the 3rd day of October in the year One Thousand Nine Hundred and Thirty-two and

Supplemental Subpoena.

of the Independence of the United States the One Hundred and fifty-seventh.

CHARLES WEISER
Clerk.

BOEHM & ZEIGER
30 Broad Street
Solicitor.

The defendants are required to file their Answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof, excluding the day of said service, otherwise the Bill aforesaid may be taken Pro Confesso.

CHARLES WEISER
Clerk.

SEAL

Supplemental Petition of Benjamin F. Johnson.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E. 71-153-1932.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The supplemental petition of Benjamin F. Johnson, respectfully shows and represents:

(1) With respect to the appointment of the *de facto* receiver, William Roberts for the Manhattan Railway Company, which is believed to be void, your petitioner

208 *Supplemental Petition of Benjamin F. Johnson.*

further avers on information and belief that the said Roberts knew long in advance of the filing of the application for receivership of the Interborough Rapid Transit Company, and the subsequent application for receivership of Manhattan Railway Company, that the same were brought about pursuant to an understanding or conspiracy of which the said Roberts had knowledge, and in support of petitioner's belief, he says:

(a) That at a special meeting of the directors and/or executive committee of Manhattan Railway Company
209 held during the latter part of April, 1932, the said Roberts presented to Manhattan Railway Company a bill for $60,000., or thereabouts, for professional services alleged to have been rendered to said Company for a period of three years prior thereto. That at the time of the special meeting, said Roberts was president, counsel and a director of the Company. That at said special meeting the directors authorized the payment to Roberts of said $60,000., although the payment of said sum to Roberts virtually exhausted the entire cash in the treasury of said Company.

(b) That in April and May, 1932, although it was
210 known to Roberts from the official financial reports of the Interborough Rapid Transit Company that said Company had cash on hand far in excess of its cash the previous year, nevertheless instructions were issued by the firm of J. P. Morgan & Company, the bankers of the Interborough Rapid Transit Company, that there should be no payment made of some $860,000. due to the City of New York for real estate and franchise taxes on Manhattan Railway Company, the said taxes being due in May, 1932. That said Roberts took no action in the matter at that time, and it was not until long after the

special meeting at which he secured for himself payment for all of his legal services to Manhattan Railway Company that the said Roberts, for the first time, wrote letters to the management of the Interborough Rapid Transit Company making claim for under maintenance of the property of Manhattan Railway Company and for failure to make replacements on the property of Manhattan. Railway Company in violation of the existing lease of Manhattan lines to Interborough, and your petitioner believes that such action taken in June and July, 1932, or only one month prior to the receivership of the Interborough Rapid Transit Company, was solely for the purpose of protecting the said Roberts against a suit by the stockholders, and others, for misfeasance and malfeasance in office.

(c) Your petitioner is informed and believes, and therefore avers, that during all of the negotiations extending for several years with the Transit Commission and other public bodies in connection with proposed plans for the unification of New York City's systems of transportation, the said Roberts although president, counsel and director of Manhattan Railway Company took no part in the negotiations for unification and did not designate any attorney or agent to represent Manhattan Railway Company at any of said conferences to the great detriment of the security holders and creditors of Manhattan Railway Company.

(d) Your petitioner further says, that during the entire tenure of office by said Roberts, he has done virtually nothing to promote the interest and welfare of Manhattan Railway Company. That he took no interest in its affairs, that he did not own but a very small amount of the stock of said Company at any time, and that dur-

214 *Supplemental Petition of Benjamin F. Johnson.*

ing the entire period, and particularly for several months prior to the filing of the receivership applications for Interborough and Manhattan, the said Roberts was and is under the domination and control of the interests representing Brooklyn-Manhattan Transit Company and Interborough Rapid Transit Company, and that there is great need for having at least two receivers for Manhattan Railway Company who are wholly independent and in whom the stockholders of the Company have faith and confidence, for without such independent receivers it will be virtually impossible to afford protection to the stock-
215 holders of Manhattan Railway Company and others financially interested therein.

(2) Your petitioner further says, that Thomas L. Chadbourne of the firm of Chadbourne, Stanchfield & Levy has been for years and was up to the time of the filing of application for receivership, the special counsel for the Brooklyn-Manhattan Transit Company; that a few days before the filing of the receivership petition by American Brake Shoe & Foundry Company *vs.* Interborough Rapid Transit Company, the said Chadbourne attended before the Transit Commission of the State of New York and represented the Brooklyn-Manhattan
216 Transit Company, and subsidiaries, in negotiations respecting unification and other transit problems. That upon the Interborough Rapid Transit Company being placed in equity receivership through the orders of Senior Circuit Judge Manton herein complained of, the said Chadbourne made the statement to numerous persons and reporters that such receivership would probably make it necessary for his associate and partner, Victor J. Dowling, to sever his connections with said firm of Chadbourne, Stanchfield & Levy.

(3) Petitioner further avers that although the order appointing Victor J. Dowling, as receiver of Interborough Rapid Transit Company, was made on August 26, 1932, the said Dowling was at the time in Europe, and that he did not return to the United States until on or about September 7, 1932. On said day, namely, September 7, 1932, as petitioner is informed and believes, the said Dowling was interviewed by numerous persons, including ship reporters representing various newspapers in the City of New York, and that said Dowling on that day made the statement that he was not sure whether he would have to resign his association and connection with the law firm of Chadbourne, Stanchfield & Levy, who were unlawfully designated to act as the counsel for the receivers of the Interborough Rapid Transit Company.

(4) Petitioner is informed and believes, and therefore avers, that in view of the statement made by said Chadbourne following the receivership, and in view of the statement made by said Victor J. Dowling upon his return to the United States that his appointment some 10 days earlier would require his severance with the law firm of Chadbourne, Stanchfield & Levy, that the affidavit of said Victor J. Dowling, verified on September 23, 1932, to the effect that he had severed all relations or connections with said law firm prior to his appointment as receiver requires further investigation in that the same does not properly comply with Rule 11 of the General Rules of the Court governing equity causes; moreover, that the affidavit filed by Thomas L. Chadbourne, verified on August 26, 1932, intended as a compliance with Rule 11 governing equity causes, does not properly comply with said rule, and your petitioner believes that the affidavit and appointment designating the firm of Chadbourne, Stanchfield & Levy, in view of the connections

220 *Supplemental Petition of Benjamin F. Johnson.*

of members of this firm with the Brooklyn-Manhattan Transit Company and the Interborough Rapid Transit Company who have a common chairman of the board and common directors, plainly shows that said law firm should not be allowed to act as the attorneys for receivers, if and when said solicitors are appointed by this Court.

(5) Your petitioner believes that independent receivers and independent counsel for receivers should be appointed for Manhattan Railway Company and for In-
221 terborough Rapid Transit Company who are experienced and well versed in finance, reorganization and who are familiar with the serious and complicated problems affecting Manhattan Railway Company and the Interborough Rapid Transit Company as a result of the default of the 6% and 7% Notes of Interborough, as well as the default under the existing lease of Manhattan Railway Company, inasmuch as the same are believed to be in furtherance of a conspiracy involving the said Chadbourne and the said Dowling, and the said Murray, the co-receiver for Interborough Rapid Transit Company, and the said Roberts,—the acting receivers appointed by orders of Senior Circuit Judge Manton, which petitioner
222 believes should be vacated and set aside on the ground that they were and are void.

(6) There is annexed hereto a printed financial report of the Interborough Rapid Transit Company as of June 30, 1932, published in the Wall Street Journal of September 30, 1932, from which it will be noted that the Interborough Rapid Transit Company had cash on hand in June, 1932 of $4,588,298., as against cash on hand on the same date in 1931 of only $3,882,290., and that the real estate and franchise taxes were paid by the Inter-

borough in 1931 before the aforesaid conspiracy was entered upon. Moreover, the said report shows virtually no difference in the Company's gross income as between 1931 and 1932. Furthermore, the said report shows that the Interborough Rapid Transit Company deducted as a charge the rental of 5% on Manhattan Modified Stock at full accrual of 5% on all of the $55,000,000. of said stock outstanding, although no dividends have been paid on said stock for several years. Moreover, it will be noticed from said financial statement that while the fixed charges of the Interborough System in 1931 was $14,102,224., that in 1932 the fixed charges were only $13,995,576. 224

(7) Petitioner further avers that at a recent hearing before Judge Manton on the question of paying the real estate and franchise taxes, the representatives of the Interborough Rapid Transit Company, through counsel, stated openly to the Court that the Interborough Rapid Transit Company had cash on hand at this time of approximately $8,000,000. Your petitioner believes, and therefore avers, that an analysis and independent audit of the accounts of Interborough Rapid Transit Company would show that said Company was and is in a very prosperous condition, and that there was no need for the defaults on its Gold Notes on September 1st and October 1, 1932, respectively, and that if every railroad in the United States was in as good condition as Interborough Rapid Transit Company there would not have been and there would not be any depression in this country; and that this so-called friendly receivership which appears now to be necessary on account of the defaults should at least be administered by thoroughly independent and thoroughly competent receivers and counsel. 225

Supplemental Petition of Benjamin F. Johnson.

WHEREFORE, your petitioner renews his prayers that this Court should take judicial custody of the Interborough and Manhattan properties and administer the same, and appoint independent receivers for the benefit and protection of all of the security holders and creditors of both companies.

BENJAMIN F. JOHNSON,
By (Signed) CHARLES FRANKLIN,
Solicitor.

(Signed) CHARLES FRANKLIN,
Solicitor for Complainant,
Office & Post Office Address,
165 Broadway,
Borough of Manhattan,
New York City.

LEONARD H. GOLDENSON,
Of Counsel.

Supplemental Petition of Benjamin F. Johnson.

WALL STREET JOURNAL, SEPTEMBER 30TH, 1932.

$831,749 I. R. T. Loss Year to June 30

Figure in Preliminary Report Compares With $533,484 in Previous Period

Preliminary report of Interborough Rapid Transit Co. for year ended June 30, 1932, shows loss of $831,749 after taxes, rentals, fixed charges, etc., but before deducting 5% dividend rental on Manhattan modified guarantee stock, comparing with loss of $533,484 in the preceding fiscal year. After deducting 5% Manhattan modified dividend rental, there was a deficit of $3,614,199, against deficit of $3,315,934 in preceding fiscal year.

Preliminary income account for year ended June 30, 1932, compares as follows:

	1932	*1931*	*1930*	*1929*
Gross	$66,320,859	$70,758,024	$72,391,867	$69,174,294
Oper Exp	42,829,177	45,535,580	45,401,438	42,344,462
Net rev	$23,491,682	$25,222,444	$26,990,429	$26,829,832
Taxes	2,377,443	2,892,228	2,522,435	2,393,735
1-X Current rent deductions.	3,022,536	5,027,934	5,022,838	5,058,835
Other deduct	354,368	.....	.....	.....
Bal to be div between city and co	$15,737,335	$17,302,282	$19,445,156	$19,377,262
Pay to city under contract No. 3	2,685,388	3,827,838	5,477,627	404,776
Company's gross income.	$13,051,947	$13,474,444	$13,967,529	$18,972,486
Fixed charges	13,955,576	14,102,224	13,696,197	13,743,572
Net op loss	$ 903,629	$ 627,780	2-X$ 271,332	2-X$ 5,228,914
Non-op income	71,880	94,296	356,040	561,436
Loss	$ 831,749	$ 533,484	2-X$ 627,372	2-X$ 5,790,350
3-X Manhat div rent	2,782,450	2,782,450	2,782,450	2,782,450
Deficit	$ 3,614,199	$ 3,315,934	$ 2,155,078	X$ 3,007,900

3-X Dividend rental of 5% on Manhattan modified guarantee stock (payable if earned) is shown above at full accrual of 5% on all stock assenting to plan of readjustment of May 1, 1922.

1-X Includes 7% dividend rental on Manhattan guarantee stock.

2-X Income.

Supplemental Petition of Benjamin F. Johnson.

General balance sheet of Interborough Rapid Transit Co. as of June 30, 1932 (preliminary figures), compares as follows:

ASSETS

	1932	*1931*	*1930*
Fixed capital	$231,244,596	$230,348,028	$229,623,429
Const & equip funds	1,222,122	1,262,003	1,358,443
Investments	15,938,566	15,937,029	15,935,546
Vol relief fund	97,754	89,205	94,687
Cash	4,588,298	3,882,299	7,671,191
Special deposits	370	514	180,218
Mortgage bonds payable	685,000	281,000	285,000
Accts rec, incl int accrd	420,192	574,976	614,125
Due corp gen cash and construction fund	33,587	27,269	25,822
Prepayments	140,432	250,749	295,131
Due corp cash from sub cash	.....	.....	3,547,916
Due from assoc cos	6,906,199	6,906,426	6,906,392
Items await distrib	.....	.....	668,204
Accts in suspense	5,721,082	5,715,422	5,118,752
Deferred charges	19,735,378	17,205,685	16,133,108
Def und elev ex	125,931,104	114,110,004	103,300,434
Materials & suppl	2,237,988	2,595,499	2,456,988
Secur dep with State Ind Commission	1,908,000	1,064,000	1,064,000
Due from N Y R T	2,401,022	1,952,004	1,505,018
Bank Trust Co, trustee under coll ind	54,989,000	56,018,000	56,698,000
First & ref mtge 5% bonds reacquired	1,612,000	863,000	747,000
Guaranty Trust Co. trust under spec agree dated Sept 1, 1922	6,740,000	7,232,000	2,263,000
Adv from corp fund for const und contr No. 3	11,535,954	11,469,858	11,376,808
Total	$494,068,644	$477,764,970	$467,869,212

LIABILITIES

Capital stock	$ 35,000,000	$ 35,000,000	$ 35,000,000
Funded debt	171,906,000	170,853,000	169,694,000
Notes outstanding	42,172,100	42,738,000	43,124,000
Rap Tr Sub Constr Co notes payable	5,898,448	4,860,108	3,490,108
Manhattan Ry Co lease acct	377,323	377,323	377,323
Accts pay from const & eq funds	244,482	222,065	218,124
Sink fd on 1st & ref mtg 5% bonds accrued	1,320,582	1,401,090	1,438,805
Lessee's deduct under Contr No. 3 due corp cash from sub cash	.....	.....	3,547,916
Due for wages	493,335	594,592	529,779
Int & rent due & accrd	3,860,573	4,295,066	8,053,139
Accounts payable	1,000,244	832,529	763,248
Taxes due and accrd	1,652,325	1,018,844	1,695,689
1st & ref bds released as coll to 7% notes for skg fd due July 1, 1930	.....	281,000	285,000
Trustee for vol relief fund	97,754	89,205	94,688
Items await distrib	561,664	255,741	270,130
Deferred liabilities	19,407,584	17,076,735	16,167,527
Deprec reserves, etc	2,155,397	1,275,097	1,289,291
Def cred accr und elev ex cert	125,931,104	114,110,004	103,300,433
Res for cost of items which und agree-m't of Aug 30, 1929, have become assets of the enterprise	4,145,988	3,659,499	3,520,987
Def rent acct N Y R T Corp	2,401,022	1,952,004	1,505,018
1st & ref mtge 5% gold bds pledged as coll	54,989,000	56,018,000	56,698,000
Rel by Bank Trust Co trustee	1,612,000	863,000	747,000
Issued & held in special trust	6,740,000	7,232,000	2,263,000
Def cred—adv from corp fund for const & eq und Contr No. 3	11,535,954	11,469,858	11,376,808
Surplus	565,765	1,310,210	2,419,199
Total	$494,068,644	$477,784,970	$467,869,212

238

Bill of Complaint of Lillian Boehm.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM
239 ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E 71-153-1932

240

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

The intervenor, LILLIAN BOEHM, brings this, her supplemental bill of complaint, against the above named defendants, and respectfully alleges the following:

1. On information and belief, that the complainant herein, BENJAMIN F. JOHNSON, is a resident of Winchester, Kentucky, and a citizen of the State of Kentucky, and is the record holder of 100 shares of the defendant,

Manhattan Railway Company (hereinafter called Manhattan), having a par value of $10,000.

2. That the intervenor, LILLIAN BOEHM, was by order of the Hon. Francis G. Caffey, United States District Judge, Southern District of New York, dated September 21, 1932, and duly filed in the Office of the Clerk of this Court, permitted to intervene as a party plaintiff in the above entitled action.

3. That the intervenor is a resident of the County and City of New York, and a citizen of the State of New 242
York, and is the owner of $60,000. of First and Refunding Mortgage 5% gold bonds of the defendant, Interborough Rapid Transit Company due in 1966, and $35,000. of its Ten Year Secured Convertible 7% gold notes which became due on September 1st, 1932, and are now in default.

4. On information and belief, that the defendants Manhattan Railway Company and Interborough Rapid Transit Company (hereinafter called Interborough), are railroad corporations, and were at all times hereinafter mentioned, and are now, corporations duly organized and existing under and by virtue of the laws of the State of New York, and are citizens of said State, having their 243
principal offices in the City of New York, in the Southern District of New York. That the defendants Victor J. Dowling and Thomas E. Murray, Jr., are citizens and residents of the State of New York, and were appointed temporary receivers of the defendant Interborough by an order of Honorable Martin T. Manton, U. S. Circuit Judge, on August 26, 1932, on a bill (E. 70-364) filed in the office of the Clerk of this Court; that the defendant, William Roberts, is a citizen and resident of the State of New York, and was appointed temporary receiver of the defendant Manhattan by order of Honorable Martin

T. Manton, U. S. Circuit Judge, on September 6, 1932, said appointment having been made on petition of intervention in said suit (E. 70-364). That the defendant American Brake Shoe and Foundry Company is a foreign corporation created and existing under the laws of the State of Delaware, and is made a party defendant on account of its interest in the subject-matter of this suit.

5. That this is a suit of a civil nature in equity; that the matter in controversy exceeds the sum or value of $5,000., exclusive of interest and costs, and is between citizens of different states.

6. On information and belief, that the defendant, Interborough, is a railroad corporation duly formed on or about May 6, 1902, under and in pursuance of Chapter 565 of the laws of 1890 of the State of New York, known as the Railroad Law, and the acts amendatory thereof and supplemental thereto, and pursuant to the provisions of Chapter 544 of the laws of 1902 of the State of New York, being an Act entitled "An Act to Amend Chapter 4 of the Laws of 1891, entitled 'An Act to Provide for Rapid Transit Railways in Cities of Over One million Inhabitants,'" for the purpose, among others, of equipping and operating rapid transit railroads in the City of New York.

7. On information and belief, that on or about February 21, 1900, the City of New York, acting by the Board of Rapid Transit Railroad Commissioners, entered into a contract with John B. McDonald (known as Contract No. 1) for the construction, at the expense of the City, and for the equipment, maintenance and operation of certain rapid transit lines, subway and elevated, in the Boroughs of Manhattan and the Bronx, in said city, known

as the "Manhattan-Bronx Rapid Transit Railroad," which said contract, including the provisions thereof relating to the equipment, maintenance and operation of said railroad, was subsequently duly assigned to defendant Interborough in the manner required by law.

On information and belief, that on or about July 21, 1902, the City of New York, acting by the Board of Rapid Transit Railroad Commissioners, under the Rapid Transit Act, entered into a contract with Rapid Transit Subway Construction Company (known as Contract No. 2) for the construction, at the expense of the City, and for the equipment, maintenance and operation of certain rapid transit subway lines in the Boroughs of Manhattan and Brooklyn in said city, known as the "Brooklyn-Manhattan Rapid Transit Railroad," which said contract, including the provisions thereof relating to the equipment, maintenance and operation of said railroad, was subsequently duly assigned to the defendant Interborough in the manner required by law.

On information and belief, that on or about March 19, 1913, the City of New York, acting by the Public Service Commission for the First District, under the Rapid Transit Act, entered into a contract with defendant (known as Contract No. 3) for the construction by the City, in part at the expense of said City, and in part at the expense of the defendant Interborough, of certain rapid transit lines in the Boroughs of Manhattan, Bronx, Queens and Brooklyn, and for the equipment, maintenance and operation of the rapid transit lines to be constructed under said contract in conjunction with said Manhattan-Bronx Rapid Transit Railroad and said Brooklyn-Manhattan Rapid Transit Railroad then operated by the defendant Interborough under said Contract No. 1 and under said Contract No. 2.

250 *Bill of Complaint of Lillian Boehm.*

On information and belief, that the defendant Interborough is now engaged in the maintenance and operation of all of said rapid transit railroads, including the new lines constructed under said Contract No. 3, so far as the same have been completed by the City of New York.

On information and belief, the said system of rapid transit railroads now maintained and operated by the defendant Interborough under said contracts, consists of more than seventy-six (76) miles of continuous railroad, and more than two hundred sixty-two (262) miles of
251 single track in all boroughs of the City of New York except the Borough of Richmond, and the defendant Interborough employs more than eighteen thousand men.

8. On information and belief, that on or about January 1, 1903, by indenture of lease bearing said date, the defendant Manhattan Railway Company, a railroad corporation organized and existing under the laws of the State of New York, owning a system of elevated railroad in the Borough of Manhattan and the Bronx, of the City of New York, leased the said system of elevated railroad to the defendant Interborough for the term of nine hun-
252 dred and ninety-nine (999) years from November 1, 1875, upon the terms and conditions, and for the rentals in said indenture of lease set forth.

On information and belief, that on or about March 19, 1913, the Public Service Commission for the First District issued to the defendant Manhattan, and defendant Manhattan accepted, a certain certificate for the construction, equipment, maintenance and operation of certain additional tracks to certain elevated lines of said Manhattan, and that said additional tracks have been con-

structed and equipped and are now operated by the defendant Interborough under said lease.

On information and belief that on or about March 19, 1913, the Public Service Commission for the First District issued to the defendant Interborough, and the said defendant accepted, a certain certificate for the construction, equipment, maintenance and operation of certain extensions to the elevated lines, or some of them, operated by the said defendant under said lease; and that said elevated extensions have been constructed and equipped and are now operated by the said defendant under the terms of said certificate in conjunction with, and as part of the elevated system leased by the said defendant from defendant Manhattan.

On information and belief, that said elevated railroad system, including said additional tracks and elevated extensions now operated by the defendant Interborough, consists of more than forty-one (41) miles of railroad and more than one hundred thirty-seven (137) miles of single track in the Boroughs of Manhattan and the Bronx, in the City of New York.

9. On information and belief, that the cost to the defendant Interborough of the Elevated third tracks, Elevated Extensions and Manhattan power plant improvements constructed and furnished in accordance with the provisions of the aforesaid Manhattan and Interborough Certificates each granted March 19, 1913, is in excess of $44,000,000, all of which cost was provided from the proceeds of the sales of bonds and notes issued by defendant Interborough.

10. On information and belief, that in and by the documents and agreements which taken together are

known and described as the "Interborough-Manhattan Re-adjustment Plan of 1922," among other things, it was provided that as to all holders of capital stock of Manhattan who might assent to and participate in such Plan the 7% annual rate of guaranteed dividend rental on such capital stock as fixed in the aforesaid lease from the Manhattan to defendant, Interborough, should be reduced, after July 1, 1924, to the rate of 5% per annum and should be payable only if and to the extent earned by defendant Interborough in the manner in said Plan provided; that the holders of more than 90% of the outstand-
257 ing capital stock of Manhattan assented to said Plan and agreed to accept said reduced rent; that the reduced dividend rental on said capital stock of Manhattan as and when earned at the rates provided in the said Readjustment Plan has been paid by defendant Interborough, that the defendant Manhattan has formally expressed its dissatisfaction with accounts of defendant Interborough for the period subsequent to June 30, 1928, and has claimed that the dividend rental on its stock for such period is greater than the payments which defendant Interborough has made.

11. On information and belief, that under said Con-
258 tract Nos. 1, 2 and 3, it is, among other things, provided that in case the defendant Interborough shall be in unexcused default in the payment of the rental, or in the performance of any other of the obligations of said contracts, and any such default shall continue for the period or periods therein stated, the said contracts may be terminated on the terms and conditions therein set forth.

On information and belief, that under the said lease from Manhattan and the said Interborough-Manhattan Readjustment Plan it is, among other things, provided that in case the defendant Interborough shall fail to pay

the rent provided for in said lease, as reduced in accordance with the provisions of said Plan, and such default shall continue for the period therein stated, the leasehold estate thereby created may be terminated.

12. On information and belief, that the defendant, Interborough, has an authorized capital stock issued and outstanding of Thirty-five million dollars ($35,000,000); that all of the equipment provided by the defendant Interborough under said Contracts Nos. 1 and 2, including the power houses, sub-stations and rolling stock provided under said contracts and all the right, title and interest of the said defendant in said contract number 3, said lease from the Manhattan and the said certificate for elevated extensions issued to the defendant Interborough and certain other property and assets of the said defendant have been heretofore pledged under and are now subject to the First and Refunding Mortgage of the defendant Interborough, dated March 20, 1913, to Guaranty Trust Company of New York as Trustee, under which there are now issued and outstanding in the hands of the public bonds to the principal amount of more than One hundred and thirty-two million ($132,000,000) dollars, and under which there are now outstanding bonds to the additional amount of more than Fifty-four million dollars ($54,000,000), pledged to secure an issue of Ten Year Secured Convertible 7% Gold Notes of the defendant, due September 1, 1932, of which there are outstanding, in the hands of the public, notes to the principal amount of Thirty-one million, six hundred and seventy-two thousand one hundred dollars ($31,672,100); that there are also issued and outstanding in the hands of the public defendant Interborough's Unsecured Ten Year Six per cent. Gold Notes, due October 1, 1932, in the principal amount of Ten Million five hundred thousand dollars

($10,500,000); that interest on said First and Refunding Mortgage 5% gold Bonds of the defendant is due and payable on the first days of January and July in each year; that interest on said Ten Year Secured Convertible 7% Gold Notes is due and payable on the first days of March and September in each year; and that interest on said Unsecured Ten Year Six per cent. Gold Notes is due and payable on the first days of April and October in each year.

13. On information and belief, the lease from said
263 Manhattan Railway Company provides that the defendant Interborough shall pay as rental for the elevated lines demised by said lease, in addition to all taxes on the lessor and its property, the following:

> Seven per cent. (7%) per annum on the authorized and outstanding capital stock of said Manhattan Railway Company to the aggregate par value of Sixty million dollars ($60,000,000), payable quarterly to the owners of record of the shares of said stock, on the first days of January, April, July and October in each year, but as to 556,490 shares of said capital stock the dividend rental rate has been reduced to 5% per annum, payable
> 264 if earned, as hereinabove.
>
> Four percent. (4%) per annum on the Consolidated Mortgage 4% bonds of said Manhattan Railway Company of which Forty million six hundred and eighty-three thousand dollars ($40,683,000), are now outstanding, payable semi-annually on the first days of April and October in each year.
>
> Four percent. (4%) per annum on the Second Mortgage Bonds of said Manhattan Railway Com-

pany of which Four million five hundred and twenty-three thousand dollars ($4,523,000) are now outstanding, payable on the first days of June and December in each year.

14. That the defendant Interborough has failed to pay, at maturity, its Ten-Year Secured Convertible 7% Gold Notes due September 1, 1932, and this intervenor alleges that some of the over five thousand noteholders may bring suits in respect of their said notes and may levy execution on the equipment and property of the defendant Interborough used in the operation of said rapid transit subway and elevated lines; that failure to meet the interest on said First and Refunding Mortgage 5% Gold Bonds when due may operate as a default under the mortgage securing the same and render such mortgage enforceable; and that failure to pay the interest when due on said bonds of Manhattan may operate as a default under said lease and upon the expiration of the period of grace therein provided will render the same terminable; and that failure to pay each installment of rental under said lease, when due, payable to the holders of 43,510 shares of the stock of said Manhattan, who did not assent to the Readjustment Plan of 1922, may also operate as a default under said lease and will subject the defendant Interborough to innumerable actions by the holders of said stock to collect the same by reason of the guarantee by the defendant Interborough of the payment of such rental when due to each of the holders of such stock.

15. On information and belief, that defendant Interborough has failed and neglected to pay certain taxes for 1928 and 1929 duly assessed by the City of New York against various parcels of real estate owned by defendant Interborough and subject to the lien of its First and Re-

funding Mortgage, and that such unpaid taxes with the interest now due thereon amount in the aggregate to more than $480,000; that defendant Interborough's failure to pay such real estate taxes as and when the same became due, or within a period of ninety (90) days thereafter, constitutes an act of default (which has continued down to date), under the provisions of defendant Interborough's First and Refunding Mortgage and makes it subject to an action to foreclose the lien of said Mortgage.

On information and belief, that defendant Interbor-
269 ough has neglected and failed to pay certain taxes for 1932 duly assessed by the City of New York against the special franchises and real estate belonging to Manhattan, the amount of such unpaid taxes with interest now due thereon being in excess of $860,000; that defendant's lessor, Manhattan, has formally demanded in writing that such taxes be paid but that defendant Interborough has neglected and failed and continues to neglect and fail to comply with such demand and make such payment; on information and belief that such failure and such refusal constitutes an act of default on the part of the defendant Interborough under the aforesaid lease from the Manhattan and if continued for a period of ninety (90) days
270 from the date of demand of the Manhattan, will constitute an additional act of default under the terms of the defendant Interborough's First and Refunding Mortgage.

16. On information and belief, that the Transit Commission, being the Metropolitan Division of Public Service of the State of New York, purporting to act in its regulatory capacity, or as agent of the City of New York under Contract No. 3, or both, by order dated April 30, 1930, directed the defendant Interborough to provide 289

271

new steel cars ready for subway operation not later than October 1, 1931, together with the necessary power equipment; that thereafter on September 4, 1930, the aforesaid Transit Commission commenced an action or proceeding against defendant Interborough, under the Rapid Transit Act and Section 57 of the Public Service Law, for the enforcement of said order in the Supreme Court, State of New York, which action or proceeding is still pending and is now set down for trial on October 3, 1932; that the cost to defendant Interborough of compliance with the aforesaid order of the Transit Commission would be approximately $8,000,000.

272

On information and belief, that the Transit Commission, being the Metropolitan Division of Public Service of the State of New York, purporting to act in its regulatory capacity or as agent of the City of New York under Contract No. 3, or both, by order dated April 21, 1926, directed the defendant Interborough to lengthen certain of its subway local station platforms and furnish in connection therewith 382 new steel subway cars for operation together with the necessary power equipment; that for the purpose of carrying out said order the said Transit Commission acting as aforesaid, by a supplemental order dated December 31, 1927, directed the defendant Interborough to lengthen certain local subway station platforms among others at Canal Street and Spring Street and on September 4, 1930, commenced an action or proceeding against said defendant, under the Rapid Transit Act and under Section 57 of the Public Service Law, in the Supreme Court, State of New York, for the enforcement of said supplemental order of December 31, 1927, which action or proceeding is still pending and is now set down for trial on October 3, 1932; that said order of December 31, 1927, is supplemental to the order of April

273

21, 1926, and is one step in carrying out the same; that the cost to said defendant in carrying out said order of April 21, 1926, would be approximately $20,000,000.

On information and belief, that the Transit Commission, being the Metropolitan Division of the Public Service Commission of the State of New York, by order dated June 29, 1927, directed the defendant Interborough to install a certain signal system upon its subway and elevated lines, which said order was duly accepted; that this installation was to be consummated year by year; and
275 that following the terms of said order the cost of the remaining signal installation year by year would be approximately as follows: for fiscal year ended June 30, 1933, $720,000; 1934, $980,000; 1935, $1,750,000; 1936, $3,510,000; 1937, $3,000,000.

On information and belief, that defendant Interborough presently is without funds to enable it to comply with the aforesaid orders or directions, if enforced, and has no means of obtaining such funds.

On information and belief, that the aforesaid Transit Commission, acting as agent for the City of New York, has questioned the propriety and legality of certain
276 charges which the defendant Interborough has made against subway revenues and included within operating expenses for the two years ended June 30, 1931, and that the total of the items so questioned is in excess of $811,000; that the said Transit Commission has indicated its intention of filing with the said defendant formal objections to the items so questioned and that it may file such objections at any time; that under the provisions of Contract No. 3, if, as and when any such objections are filed with the defendant Interborough the latter is obliged to forthwith transfer the amount of such items

to a special suspense account and if it is subsequently determined, in the manner provided in the Contract, that the objections are well founded, then the said defendant is obliged to return to subway revenues any and all amounts so found to have been erroneously, improperly, or illegally charged against such revenue.

17. That the defendant Interborough is indebted to the intervenor in the principal sum of $35,000. upon the $35,000. of its Ten Year Secured Convertible 7% Gold Notes, of which she is the owner, and which became due and payable September 1st, 1932, together with six 27
months' interest thereon, which became due and payable likewise on September 1st, 1932, and that both principal and interest are in default and are now wholly due and unpaid, and that the defendant Interborough has admitted that it is, and will be, without financial resources to meet the same.

On information and belief, that the defendant Interborough has outstanding floating indebtedness for materials, equipment, taxes and supplies to the amount of over Two Million five hundred thousand ($2,500,000.00) Dollars; that said floating indebtedness is now overdue; that the defendant Interborough claims to be unable to pay the same; and that the holders thereof are pressing 27
for payment thereof; that some of said creditors may bring suits in respect of their said claims and may levy execution on the equipment and property of the defendant Interborough used in the operation of said rapid transit subway and elevated lines and on the material and supplies and other property of defendant Interborough on hand and kept by the said defendant for necessary use in operating said railway systems, and intervenor alleges that there is grave danger that the defendant Interborough may thereby be deprived of the use of

equipment, rolling stock and other property essential to the effective and economical operation of the said railroad systems, and that there is likewise grave danger that suits may be instituted against the defendant in respect of the claims above stated, and that it is essential to the interest of all the creditors of the defendant Interborough and to the interest of the public and of the intervenor that the property of the defendant Interborough should not be sacrificed; that the position of the defendant Interborough, and therefore of all the creditors of the defendant, including the intervenor, is rendered more
281 insecure by reason of the present bad financial situation of public service corporations generally and the general financial depression.

On information and belief, that defendant is and will be without financial resources to meet in full the following contractual obligations which are required of it because of the terms of its Mortgage, the Indenture securing its Notes, and the Manhattan lease:

(a) the principal of said Ten Year Secured Convertible 7% Gold Notes, due and payable September 1, 1932, amounting to $31,672,100;

(b) the principal of said Unsecured Ten Year
282 Six per cent. Gold Notes, due and payable October 1, 1932, amounting to $10,500,000.

18. On information and belief, that the only means whereby the defendant Interborough can meet its obligations under said contracts, certificates and leases, and pay its floating indebtedness and discharge its current obligations is by the continued maintenance and operation of said railroads by an uninterrupted use thereof; and that any suits upon or process against its properties or its revenues would seriously embarrass and cripple the

said defendant and diminish, if not destroy, its power successfully to operate said railroad systems; that said railroad subway systems, together with all their appurtenances, rolling-stock and other property connected therewith, are now in a reasonably good state and condition; that during the last year the elevated and rapid transit subway lines operated by the said defendant carried over 1,000,000,000 passengers, and that it is of vital importance to the people of the City of New York that said elevated and rapid transit subway lines shall continue to be operated and to such end it is of like importance that said systems be preserved; that unless some definite 284
action is taken on behalf of all the creditors so that the operations of said railroads may be continued, great and severe loss and irreparable injury will be inflicted upon all creditors; that the credit of the defendant Interborough has been seriously impaired; and that it has no reasonable hope of finding assistance from any quarter.

On information and belief said defendant has assets which at a fair valuation exceed the amount of its liabilities; the said defendant is unable to pay or provide for the payment of its obligations now due and will be unable to meet its obligations in the ordinary course of its business as they become due. 285

Intervenor further alleges on information and belief that unless the Court, in view of the facts above set forth shall take said railroad systems of the defendant Interborough into judicial custody for the protection of every interest therein, that immediately upon default, individual creditors of the defendant Interborough will assert their rights and remedies in different courts; that attempts will be made to secure judgments and priorities, that levies will be made upon cars, rolling stock, material and supplies indispensable to the operation of

286 *Bill of Complaint of Lillian Boehm.*

said railroad systems which will greatly interfere with and ultimately prevent defendant Interborough from the proper performance of its duties as a common carrier and will seriously diminish its earnings.

On information and belief, that an attempt by intervenor to enforce at law her claims as a general creditor would precipitate similar action on the part of other creditors; and this in turn would lead to wasteful strife and controversy, which intervenor believes can be avoided and the property preserved for equitable distribution
287 among those entitled thereto, only by the intervention of a Court of Equity and the granting of equitable relief, including the appointment of a receiver, which will lead to a realization for all of the creditors of a substantially larger amount than if such relief were not granted.

19. That, under the circumstances, the interference of a Court of Equity for the protection of intervenor's rights is imperatively required and especially for the time being the appointment of a receiver to take charge of and preserve the property of the defendant Interborough, continue the operation of its railroad systems for the accommodation of the public, and collect and receive
288 and properly appropriate the income thereof until the final decree of the Court in the premises.

20. That the defendant, American Brake Shoe and Foundry Company, claiming as a creditor of the defendant Interborough upon an indebtedness of $27,530.89, owing to it by the said defendant for brake shoes and miscellaneous castings allegedly furnished to the said defendant, commenced an action in equity in this Court entitled "American Brake Shoe and Foundry Company against Interborough Rapid Transit Company" (E-70-

289

364), praying, among other things, for an equity receivership for the defendant Interborough, and that upon its bill of complaint therein, and the admission of all the allegations thereof by the defendant Interborough in its answer thereto, and its consent to and joinder in the prayer of the bill of complaint for such receivership, an order was made by the Hon. Martin T. Manton, United States Circuit Judge, on August 26, 1932, appointing the defendants Victor J. Dowling and Thomas E. Murray, Jr., Temporary Receivers of the defendant Interborough.

290

21. Intervenor believes and therefore avers that there is imperative need for setting aside the appointments of said receivers, Dowling and Murray, and for the appointment of independent receivers under properly constituted authority for the Interborough Rapid Transit Company, upon the grounds more particularly set forth herein at length.

22. That the appointment of said receivers, as aforesaid, is believed to have been irregular, without warrant or legal authority, and void, as in violation of the effective rules, practice and procedure in the United States 291
District Court for the Southern District of New York. It is believed that the Honorable Martin T. Manton, U. S. Circuit Judge, assumed, without any legal right or any necessity therefor, the rights, powers and privileges of the United States District Court, to appoint receivers in equity causes for the Interborough; that the governing rules of this Court duly promulgated and duly published which were violated and contravened in the appointment of said receivers as aforesaid, read as follows:

292 *Bill of Complaint of Lillian Boehm.*

"United States District Court—Southern District of New York.

Matter of the Revision of the General Rules of this court by adding thereto Rule 1-a and Rule 11-a.

Due deliberation having been had, it is ordered that, effective July 1, 1932, the following rule, to be designated as 1-a, shall be and become a General Rule of this court, to wit: '1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as
293 may be assigned to him by the senior district judge.'

And also effective as of July 1, 1932, the following rule, to be designated as 11-a, shall be and become a General Rule of this court, to wit: '11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge.'

294 Dated June 30, 1932.

JOHN C. KNOX
HARRY W. GODDARD
WILLIAM BONDY
FRANK J. COLEMAN
JOHN M. WOOLSEY
FRANCIS G. CAFFEY
ALFRED C. COXE
ROBERT P. PATTERSON
United States District Judges."

295

23. Intervenor is informed and believes, and therefore avers, that at the time of the application for the appointment of receivers for the Interborough, namely, on August 26, 1932, there was a United States District Judge duly assigned and sitting in the Motion Part of the Court, as well as other District Judges of the United States District Court who were ready, able and willing to entertain the application for equity receivership of said Interborough.

24. Intervenor is informed and believes, and therefore avers, that at the time of the said application for 296
the appointment of receivers of Interborough, there was no disagreement between the District Judges of the said United States District Court, but said Judges were in entire agreement upon the division of business, and for the assignment of cases for trial, and have ever so continued; that the above quoted rule was duly adopted, approved, signed and published by each of the eight United States District Judges in the said Court.

25. That the above quoted rule was not revoked or abrogated at the time of the appointment of said receivers but was then and now is in full force and effect,
and that the District Judge assigned to the Motion Part 297
did not refuse to act upon the application of Interborough for receivers.

26. Intervenor is informed and believes, and therefore avers, that Circuit Judge Manton in making the said appointments and in taking action on the bill of complaint, unlawfully usurped the duties and functions of the Judges of this Court without legal warrant or any justification.

298 *Bill of Complaint of Lillian Boehm.*

27. Upon information and belief, that either the complainant in the Interborough suit, or one of the defendants, or intervenors therein, disregarding the effective rule, practice and procedure in such cases made and provided, and without cause or warrant therefor, prepared or caused to be entered, two separate orders dated August 25, 1932, as follows, both of which orders are believed to be irregular, unlawful and improper, and without necessity or any justification therefor, namely:

"Whereas, the undersigned as Senior Circuit
299 Judge of the Second Judicial Circuit of the United States, is empowered and authorized by law, pursuant to the provisions of Title 28, Sec. 22 of the Code of Laws of the United States of America, if the public interest so requires, to designate and assign any Circuit Judge of the Second Judicial Circuit to hold a District Court within such Circuit; and

Whereas, the undersigned, as such Senior Circuit Judge, finds that the public interest requires that Martin T. Manton, a Circuit Judge of the Second Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a
300 District Court within such Circuit, it is hereby

Ordered, adjudged and decreed, that the said Martin T. Manton be and he hereby is designated and assigned to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the matter entitled, American Brake Shoe and Foundry Company *vs.* Interborough Rapid Transit

Company, and for such further time as may be required to complete unfinished business.

Dated, New York, August 25, 1932.

MARTIN T. MANTON
Senior Circuit Judge for the
Second Judicial Circuit."

28. Intervenor is informed and believes, and therefore avers, that there was complete unity of thought and action on the part of the District Judges of this Court in relation to the Court Rule hereinabove quoted. That so far as intervenor knows, there is no prohibition in effective Rules against the appointment of individuals as receivers in equity causes in proper cases, especially where special application is made therefor.

That no such application was made to the District Judge holding the motion part, and that there was no occasion or necessity for designating an additional or other District Judge to hear and act upon the application for the appointment of receivers of the Interborough, in addition to the District Judge sitting in the Motion Part at the time said application was made. That there was no question of public interest involved which called for the designation of an additional District Judge to sit in the equity suit entitled, American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company; in fact, intervenor believes, and therefore avers, that the public interest plainly required full and complete compliance with the effective Rules, Practice and Procedure of this Court on account of the vast and important financial obligations involved.

The other order entered by said Circuit Judge on the same day (August 25, 1932), and filed in the office of the Clerk of this Court, reads as follows:

304 *Bill of Complaint of Lillian Boehm.*

"In the United States Circuit Court of Appeals

Second Judicial Circuit.

In the Matter of the Division of Business and Assignment of Cases for Trial in the Southern District of New York.	Order

305

Whereas, Martin T. Manton has been duly designated and assigned to hold a District Court of the United States for the Southern District of New York within this Second Judicial Circuit for a period of thirty days from this day; and

Whereas, Section 23 of the Judicial Code (March 3, 1919, c. 231, sec. 23, 36 Stat. 1090) provides that 'In districts having more than one district judge, the judges may agree upon a division of business and assignment of cases for trial in said district; but in case they do not so agree, the
306 Senior Circuit Judge of the Circuit in which the district lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District'; and

Whereas, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business

and assignment of cases for trial in the Southern District of New York, as provided in and pursuant to the rules of court for the Southern District of New York, heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby

ORDERED, ADJUDGED AND DECREED that, for a period of thirty days beginning with this day, all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the district judge designated to hear such application pursuant to Rule 11 a of the General Rules of the District Court for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York.

Dated, New York, August 25, 1932.

MARTIN T. MANTON."

29. Your intervenor is informed and believes, and therefore avers, that the above designation and order are each irregular, improper, without legal warrant or justification, and void; moreover, that the action taken by Honorable Martin T. Manton in appointing the aforesaid receivers for Interborough were and are likewise irregular, improper and void, and that all orders made and the action taken by said Circuit Judge subsequent to the filing of the equity bill of the Interborough are likewise null and void, as in violation of the rules, practice and procedure of this Court, and because said Circuit Judge lacked jurisdiction to entertain said receivership applications, and to make any orders, or to appoint said receivers, or to take any action whatever upon said

bill, and therefore there is grave danger that in the near future, if not now, all of the proceedings taken by the Circuit Judge, and all of the action taken by the temporary receivers appointed as aforesaid will be set aside and declared to be null and void and of no effect, to the great detriment of intervenor and of the creditors and security holders of the Interborough, with resulting irreparable damage to said parties, including intervenor.

30. That the interests involved and which are and will be affected by the irregular, void and unlawful and improper action taken on the American Brake Shoe and Foundry Company bill (E. 70-364), are so vast, and the certain likelihood of irreparable loss and damage is so great that this Court is importuned to direct a hearing in this cause at the earliest opportunity to insure against unnecessary loss and damage until the errors, irregularities and the jurisdictional defects hereinabove cited are properly cured.

31. Your intervenor is informed and believes, and therefore avers, that there is special and imperative need for having receivers for the Interborough who are independent and disconnected with the old management of said company in order to insure adequate protection to their interests and that the appointment of the receivers aforementioned, as well as continuance in office of the President and General Manager of the Interborough, or otherwise, does not and will not insure independence of action or protection, of the Interborough creditors and security holders.

32. Your intervenor further avers, upon information and belief, that the designated attorneys for the receivers of Interborough, were the firm with whom Victor J.

Dowling was associated at the time of his appointment as receiver; that said law firm, or certain members thereof, were and for years have been closely associated with the Brooklyn-Manhattan Transit Company, and during the period of one year prior to the date of August 26, 1932, said firm has directly or indirectly had professional and other connection with the subject-matter of this suit, and with the defendant Interborough, the Brooklyn-Manhattan Transit Company, and other persons interested in the cause or interested in the receivership estate. The Brooklyn-Manhattan Transit Company owns a large number of shares of Interborough, and its chairman of the board is also chairman of the board of the Interborough, while the companies also have common directors on the Brooklyn-Manhattan Transit Company, and Interborough. That the Brooklyn-Manhattan Transit Company has never been favorable to Interborough.

33. Intervenor further avers upon information and belief, that the order appointing receivers for the Interborough is void and of no effect whatsoever; that the acts of said receivers acting in a *de facto* capacity are likewise illegal, void and of no effect; that the acts of such *de facto* receivers heretofore done and about to be done have created and will continue to create serious disputes involving the legality of their acts, thereby creating doubt and confusion as to the effect of all the action taken by them.

34. That after the service and filing of the complainant's bill herein, and the service and filing of the order to show cause obtained by the complainant and granted herein, dated September 21st, 1932, praying that the orders of Circuit Judge Manton appointing receivers of the Interborough and Manhattan be vacated and set aside,

and that all parties to the American Brake Shoe and Foundry Company bill be stayed pending the hearing and determination of the said motion from applying to have the receiverships made permanent, and for the other relief in said order to show cause requested, and after the filing of the intervenor's petition for intervention herein, and the entry of the order thereon, permitting her intervention in this action as a party plaintiff, the said Circuit Judge issued the following additional orders dated September 29, 1932:

"This cause came on to be heard at this term and therefore, upon consideration thereof,

It was Ordered, Adjudged and Decreed as follows:

1. The receivership of the defendant Interborough Rapid Transit Company and of all its property and assets, and the extension of such receivership to defendant Manhattan Railway Company and of all its property and assets, are hereby continued during the pendency of this cause; Victor J. Dowling and Thomas E. Murray Jr. are hereby continued as receivers of the defendant Interborough Rapid Transit Company and of all its property and assets during the pendency of this cause, with all the powers heretofore granted said Receivers by the order of this Court entered herein; and William Roberts is hereby continued as Receiver of the defendant Manhattan Railway Company and of all its property and assets during the pendency of this cause, with all the powers heretofore granted said Receiver by the order of this Court entered herein September 6, 1932, appointing him Receiver of Manhattan Railway Company and by any other orders heretofore entered herein.

2. All other terms and provisions of said order entered herein August 26, 1932, and of said order of September 6, 1932, and all other orders entered

herein are continued during the pendency of this cause, until the further order of this court.

3. The bonds of the said Receivers, Victor J. Dowling and Thomas E. Murray Jr. in the sum of $100,000. each heretofore given by each of said Receivers in accordance with said order of this Court entered herein August 26, 1932, shall stand, and said bonds are hereby approved and shall be and be deemed to be the bonds of such Receivers acting pursuant to this order, and said Receivers are hereby authorized to pay the premiums on said bonds out of the receivership estate of Interborough Rapid Transit Company.

32

4. The bond of the said Receiver, William Roberts, in the sum of $100,000 heretofore given by said Receiver in accordance with said order of this Court entered herein September 6, 1932, shall stand, and said bond is hereby approved and shall be and be deemed to be the bond of said Receiver acting pursuant to this order, and said Receiver is hereby authorized to pay the premium on said bond out of the receivership estate of Manhattan Railway Company.

5. Any application or petition for orders or instructions or otherwise in this cause shall be made to the undersigned, in chambers or otherwise, the undersigned hereby reserving full right and jurisdiction over this cause and any and all proceedings herein. 321

6. The September 1932, equity term of this court is extended until after the complete execution and carrying out of this order and decree, and until after the final determination and disposition of all matters herein reserved for future determination or action by this court. Said equity term is extended, in any event, for a period of three years from the date of this order or decree, with leave to any party to the above-entitled cause at any time prior to the expiration of said period of

322 *Bill of Complaint of Lillian Boehm.*

three years to apply to this court reserving full jurisdiction over the parties to the above-entitled cause and over the property and assets of the defendant, Interborough Rapid Transit Company and of the defendant, Manhattan Elevated Railway Company, and reserves for later adjudication or other action any and all matters which in due course may come before this court for determination and for that purpose the term of the court is hereby extended.

Dated, New York, September 28th, 1932.

MARTIN T. MANTON
323 United States Circuit Judge designated to hold a session of the District Court, for the Southern District of New York"

The intervenor is informed and believes, and therefore avers that the above quoted order is irregular, improper, null, void and of no legal effect, and that the same should be vacated and set aside.

35. That intervenor has no adequate remedy at law for her aforesaid grievances, and can have relief only in equity.

324

WHEREFORE, the intervenor joins in the prayers of the complainant herein set forth in his bill of complaint and supplemental bill and/or petition herein, and the intervenor more specifically prays:

1. That the designation of Hon. Martin T. Manton, Circuit Judge, dated August 25th, 1932, appointing himself as District Judge for the purpose of hearing the application for a receiver of the Interborough Rapid Transit Company be vacated and set aside.

2. That the order of Hon. Martin T. Manton, Circuit Judge, dated August 25th, 1932, appointing himself as an additional District Judge to hear all applications for the appointment of receivers in equity causes in the Southern District of New York, be vacated and set aside.

3. That this Court vacate and set aside the order entered August 26, 1932, appointing Victor J. Dowling and Thomas E. Murray, Jr., as temporary receivers for the Interborough in the American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, et al (E. 70-364) upon the ground that said Circuit Judge was without jurisdiction to entertain said petition for receivership or to make the order of appointment of said receivers.

4. That this Court vacate and set aside the order made September 28th, 1932, by the Hon. Martin T. Manton, U. S. Circuit Judge, continuing, pendente lite, the Interborough receivership and the appointment of the receivers thereof, and reserving to the said Judge full right and jurisdiction over the said cause, and all proceedings thereof, and extending the equity term of this Court by the Hon. Martin T. Manton, U. S. Circuit Judge, until after the final determination and disposition of all matters in the said equity cause, and, in any event, for three years.

5. That this Court appoint independent receivers for Interborough who are disassociated with either the Brooklyn-Manhattan Transit Company, or the Interborough Rapid Transit Company, and their respective officers, bankers or counsel.

6. That the attorneys and counsel appointed for such receiver and/or receivers of the Interborough shall have no connection of whatsoever kind or nature with the Man-

hattan or Brooklyn-Manhattan Transit Company, or with their officers, bankers, attorneys and counsel.

7. That this Honorable Court will forthwith appoint separate and independent receivers of all and singular the property and assets of every nature, wheresoever situated, held, owned or controlled by Interborough, with full power and authority to take into their possession, hold, manage and operate the business and properties of the defendant, Interborough, and receive and collect the rents, issues and profits thereof, with such powers as this
329 Honorable Court may from time to time grant, including the power to borrow money on receiver's certificates or otherwise, and for that purpose to incur such expenses as may be necessary or advisable in connection therewith, to purchase and sell, for cash or on credit, such merchandise, supplies, equipment, materials or other property as may be necessary or advisable in connection with the administration of the assets of Interborough, and the continuation of its business to such extent as may be authorized by this Honorable Court; to bring suit for, collect, receive and take into their possession all the property and assets, real, personal or mixed, goods, chattels, credits, rights, claims and equities, books, papers, securi-
330 ties, cash and other property whatsoever and wheresoever situated; and in continuing, managing and operating said business, so far as authorized by this Honorable Court, to act in association with any receiver or receivers who may be appointed by any other court to take possession of and operate any property of the said defendant situated outside the jurisdiction of this court, and to that end to transfer and consent to the transfer from time to time of such raw materials, materials in process, finished products, moneys and credits to and from this jurisdic-

tion and any such other jurisdiction for the purpose of said business to the extent that the conduct thereof may from time to time reasonably require, and to cooperate to the fullest extent with any such other receiver or receivers in continuing, managing and operating said business, so far as authorized by this Honorable Court, as a whole, and in arranging for and making such transfers; to appoint and employ such managers, agents, employees, servants, accountants, attorneys and counsel as may in his or their judgment be advisable or necessary in the management, conduct, control or custody of the affairs of the defendant Interborough and of the assets thereof, and to make such payments and disbursements as may be needful or proper for the purposes aforesaid or otherwise for the preservation and operation of the properties of Interborough, so far as authorized by this Honorable Court, including authority to make payment of debts entitled to priority and of the wages and salaries of agents, employees, laborers and servants of said Interborough, accrued or to accrue, which are entitled to priority by statute or which said receiver or receivers shall deem to be necessary or expedient to pay to secure the continuation of their services or to avoid detriment to the working organization of the business; to institute, prosecute and defend, compromise, adjust, intervene in or become a party to suits, actions, proceedings at law, in equity, or in admiralty, including ancillary proceedings in state or federal courts or courts of foreign nations, and likewise to defend, compromise or adjust, or otherwise dispose of any or all suits, actions or proceedings instituted against him or them as receiver or receivers or against Interborough, and also to appear in and conduct the prosecution or defense of any suit or adjust or compromise actions or proceedings now pending in any

court by or against Interborough, and to compound and settle with all debtors of said defendant, with persons having possession of their respective properties or in any way responsible at law or in equity to Interborough, and with the further usual powers of receivers in such cases; and that the officers, managers, superintendents, agents, attorneys, and employees of Interborough, be required forthwith to deliver up to said receivers the possession of all and every part of the properties of the defendant Interborough, wheresoever situated, including the several books, vouchers, and papers in any way relating to the
335 business or corporate proceedings of the said defendant.

8. That this Honorable Court administer all and singular the property rights and business belonging to Interborough, and adjudicate, enforce and adjust the rights, liens, equities and claims of all the creditors of the said defendant, including the claim of the intervenor, as the same may be determined.

9. That all creditors, stockholders and other persons be enjoined permanently and pendente lite from instituting or prosecuting or continuing the prosecution of any actions, suits or other proceedings at law or in
336 equity or under any statute against Interborough, and from levying any attachments, executions or other processes upon or against any of the properties of Interborough, and from taking or attempting to take into their possession any part of the property of Interborough, and from doing any act whatsoever to interfere with the possession of and management by the said receivers of the properties of Interborough, or in any way to interfere with the said receiver or receivers in the discharge of his or their duties, or to interfere in any way with the

administration and disposition in this suit of the affairs and properties of Interborough.

10. That this intervenor shall have such other and further relief as to the court may seem just and equitable in the premises, together with the costs of this action.

LILLIAN BOEHM

BOEHM & ZEIGER
Attorney for Intervenor

LILLIAN BOEHM
Office & P. O. Address,
No. 30 Broad Street,
Borough of Manhattan,
New York City.

LOUIS BOEHM
Of counsel.

340 **Order to Show Cause of September 21st, 1932 on Petition of Benjamin F. Johnson.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

341 MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E71-153-1932.

342

Upon reading and filing the Bill of Complaint herein and the annexed petition of said complainant, both verified September 20, 1932, and upon the Bill of Complaint in the equity cause entitled American Brake Shoe & Foundry Company *v.* Interborough Rapid Transit Company (E 70-364), and the Bill of Complaint in the equity cause entitled Harry Barber *v.* Manhattan Railway Company, et al (E 71-38), and upon all of the proceedings heretofore had thereon, it is

Order to Show Cause of September 21st, 1932 on Petition of Benjamin F. Johnson. 343

ORDERED, that the above named defendants, or their attorneys, show cause before this Court at Room 235, Old Post Office Building, Park Row, Borough of Manhattan, New York City, on the 4th day of October, 1932, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why orders should not be issued:

(1) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 25, 1932, designating and assigning himself to hold a District 344
Court of the United States for the Southern District of New York to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company.

(2) Vacating and setting aside order of Hon. Martin T. Manton, Circuit Judge, dated August 25, 1932, designating himself for a period of thirty days thereafter to hear and determine all applications for the appointment of receivers in equity causes in the United States District Court for the Southern District of New York.

345

(3) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, entered August 26, 1932 appointing Victor J. Dowling and Thomas E. Murray, Jr., as temporary receivers for Interborough Rapid Transit Company in the American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, et al case (E 70-364).

(4) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, made September

346 *Order to Show Cause of September 21st, 1932 on Petition of Benjamin F. Johnson.*

6, 1932 appointing William Roberts, as temporary receiver for Manhattan Railway Company in the American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, et al case (E 70 364).

(5) Appointing independent receivers of the Interborough Rapid Transit Company.

(6) Appointing independent receivers of Manhattan Railway Company.

347 (7) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 26, 1932 appointing Messrs. Chadbourne, Stanchfield & Levy, as Solicitors and General Counsel for the receivers of the Interborough Rapid Transit Company, as in violation of effective Rules, Practice and Procedure of this Court governing the qualifications of solicitors acting for receivers.

(8) That the American Brake Shoe and Foundry Company, Victor J. Dowling, Thomas E. Murray, Jr. and William Roberts, their agents, attorneys, counsel, employees and servants and/or any, all or each of them be stayed from applying for a permanent receivership
348 of Interborough Rapid Transit Company and Manhattan Railway Company pending the hearing or determination of this motion.

(9) Allowing complainant to have the within petition heard before the United States District Court sitting *en banc.*

(10) That complainant have such other and further relief in the premises as to the Court may seem just and proper.

Order to Show Cause of September 21st, 1932 on Petition of Benjamin F. Johnson.

Sufficient reason appearing therefor, service of a copy of this order and the annexed petition upon each and all the defendants above-named, or their attorneys, and upon Harry Barber, or his attorney, on or before the 26th day of September, 1932, shall be deemed sufficient service thereof.

Dated, New York, September 21, 1932.

FRANCIS G. CAFFEY
U. S. D. J.

352

Petition of Benjamin F. Johnson.

UNITED STATES DISTRICT COURT

For the Southern District of New York.

Benjamin F. Johnson, Complainant, *against* Manhattan Railway Company, subject to leave of Court William 353 Roberts, as Temporary Receiver of Manhattan Railway Company, Interborough Rapid Transit Company, subject to leave of Court Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company, The City of New York, and American Brake Shoe and Foundry Company, Defendants.	In Equity E 71-153-1932

354

To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

The petition of Benjamin F. Johnson, respectfully shows and represents that he is the complainant in the above entitled cause.

(1) That the above cause is a stockholders' suit brought on behalf of the Manhattan Railway Company stockholders, and all others similarly situated. For the

contents of the bill of complaint, and the proceedings had thereon, reference is made to the said bill, and the papers on file in the office of the Clerk of this Court.

(2) That petitioner is a citizen of and resident of Winchester, Kentucky, and is the record holder of 100 shares of the capital stock of the defendant Manhattan Railway Company (hereinafter called Manhattan) having a par value $10,000.

(3) That your petitioner did not acquire such shares for the purpose of bringing a collusive suit or for the purpose of conferring jurisdiction of this cause upon this Court, and that this suit is not a collusive one and is brought in good faith for the benefit of the Manhattan Railway Company.

(4) Your petitioner avers that the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 25, 1932, designating and assigning himself to hold a District Court of the United States for the Southern District of New York to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, and the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 25, 1932, designating himself for a period of thirty days thereafter to hear and determine all applications for the appointment of receivers in equity causes in the United States District Court for the Southern District of New York were each void, irregular, improper and without legal warrant or justification; your petitioner prays that said orders of Hon. Martin T. Manton, U. S. Circuit Judge, be vacated and set aside upon the grounds and allegations set forth in the bill of complaint in this cause.

358 *Petition of Benjamin F. Johnson.*

(5) Your petitioner prays that the orders appointing temporary receivers for Interborough Rapid Transit Company, dated August 26, 1932, and Manhattan Railway Company made September 6, 1932, be vacated and set aside upon the grounds and allegations set forth in the bill of complaint.

(6) That your petitioner avers that receivers should be appointed forthwith for the Manhattan Railway Company and the Interborough Rapid Transit Company upon the grounds and allegations set forth in the bill of com-
359 plaint herein.

(7) That your petitioner avers that the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 26, 1932 appointing Messrs. Chadbourne, Stanchfield & Levy, as Solicitors and General Counsel for the receivers of the Interborough Rapid Transit Company, was and is in violation of the effective Rules and Practice and Procedure of this Court governing the qualifications of solicitors acting for receivers; that your petitioner and complainant avers upon information and belief that said designated attorneys for the receivers of Interborough, were during the period of one year prior to the date of
360 August 26, 1932, directly and/or indirectly connected with the Interborough Rapid Transit Company, and Brooklyn-Manhattan Transit Company, their officers, bankers and other persons interested in the cause or interested in the receivership estate, as is more fully set forth in the bill of complaint herein.

(8) That your petitioner and complainant believes and therefore avers that the importance and significance of this order to show cause makes it advisable that it be heard by this Court sitting *en banc*.

(9) That your petitioner and complainant avers upon information and belief, that the order appointing receivers for the Interborough Rapid Transit Company dated August 26, 1932, and the order made September 6, 1932 appointing receiver for Manhattan Railway Company, are null, void and of no effect; that the acts of said receivers acting in a *de facto* capacity are likewise illegal, void and of no effect; that the acts of such *de facto* receivers heretofore done and about to be done have created and will continue to create serious disputes involving the legality of their acts; that the danger of serious and irreparable injury to the interests of Manhattan and Interborough require that the American Brake Shoe and Foundry Company, Victor J. Dowling, Thomas E. Murray, Jr., and William Roberts, their agents, employees, servants, counsel or attorneys and/or any, all or each of them be enjoined and stayed from applying for a permanent receivership of Interborough Rapid Transit Company and Manhattan Railway Company pending the hearing and determination of this motion.

WHEREFORE, your petitioner and complainant respectfully asks that the prayers for relief contained in the bill of complaint herein, and in this order to show cause, be granted by this Honorable Court, and that receivers of Manhattan Railway Company and Interborough Rapid Transit Company be appointed as prayed for.

364 *Petition of Benjamin F. Johnson.*

That no previous or other application has been made for this relief herein sought.

Dated, New York, September 20, 1932.

BENJAMIN F. JOHNSON
By (Signed) CHARLES FRANKLIN
Solicitor.

(Signed) CHARLES FRANKLIN

CHARLES FRANKLIN,
Solicitor for Complainant,
365 Office & Post Office Address,
165 Broadway,
Borough of Manhattan,
New York City.

LEONARD M. GOLDENSON,
Of Counsel.

366

Order to Show Cause of October 1st, 1932 on Petition and Supplemental Bill of Complaint of Benjamin F. Johnson.

UNITED STATES DISTRICT COURT

For the Southern District of New York.

Benjamin F. Johnson,
Complainant,

against

Manhattan Railway Company, subject to leave of Court William Roberts, as Temporary Receiver of Manhattan Railway Company, Interborough Rapid Transit Company, subject to leave of Court Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company, The City of New York, and American Brake Shoe and Foundry Company,
Defendants.

Upon reading and filing the supplemental bill of complaint herein, and the annexed petition of the said complainant, both verified October 1st, 1932, and upon the bill of complaint herein, and all papers and proceedings had herein, and upon the bill of complaint in the equity cause entitled "American Brake Shoe and Foundry Company, against Interborough Rapid Transit Company

370 *Order to Show Cause of October 1st, 1932 on Petition and Supplemental Bill of Complaint of Benjamin F. Johnson.*

(E70-364), and upon all of the proceedings heretofore had thereon, it is

ORDERED, that the above named defendants, or their attorneys show cause before this Court, at Room 235, Old Post Office Building, Park Row, Borough of Manhattan, City of New York, on the 4th day of October, 1932, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, WHY orders should not be issued, (1) vacating and setting aside the
371 order of the Honorable Martin T. Manton, United States Circuit Judge, dated September 28, 1932, which, among other things, continued, during the pendency of the said equity cause entitled "American Brake Shoe and Foundry Company against Interborough Rapid Transit Company", the receivership of the defendant, Interborough Rapid Transit Company, and the appointment of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers thereof, and the receivership of the Manhattan Railway Company, and the appointment of William Roberts, as Receiver thereof, and which reserved to the said Hon. Martin T. Manton, United States Circuit Judge, full right and jurisdiction over the said cause, and all
372 proceedings therein, and which extended the equity term of this Court by the Honorable Martin T. Manton, United States Circuit Judge, sitting as United States District Judge, until after the final determination and disposition of all matters in the said equity cause, and, in any event, for a period of three years from the date of the said order or decree;

(2) allowing complainant to have the within petition heard before the United States District Court, sitting *en banc*;

Order to Show Cause of October 1st, 1932 on Petition and Supplemental Bill of Complaint of Benjamin F. Johnson.

(3) granting to complainant such other and further relief in the premises as to the Court may seem just and proper.

SUFFICIENT reason appearing therefor, service of a copy of this order, and the annexed petition, on each and all the defendants above named, or their attorneys, on or before 3 o'clock P. M. the 1st day of October, 1932, shall be deemed sufficient service thereof.

Dated, New York, October 1st, 1932.

(sgd) WILLIAM BONDY
U. S. D. J.

376

Petition of Benjamin F. Johnson.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

377

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E. 153-1932.

378

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The Petition of BENJAMIN F. JOHNSON, respectfully shows and represents that he is the complainant in the above entitled cause.

1. That the above cause is a stockholder's suit brought on behalf of the Manhattan Railway Company stockholders, and all others similarly situated. For the contents of the bill of complaint and the supplemental bill of complaint, and the proceedings had thereon, reference is made to the said bill and supplemental bill, and the papers on file in the Office of the Clerk of this Court.

2. That upon the bill of complaint filed herein, and the petition of the complainant, both verified September 20th, 1932, an order to show cause herein was signed by the Hon. Francis G. Caffey, United States District Judge, 380 dated September 21st, 1932, returnable on October 4th, 1932, why orders should not be issued vacating the order of the Honorable Martin T. Manton, United States Circuit Judge, dated August 25th, 1932, designating and assigning himself to hold a District Court of the United States, for the Southern District of New York, to hear and determine all applications and proceedings in the cause entitled "American Brake Shoe and Foundry Company against Interborough Rapid Transit Company", vacating also his order of the same date designating himself for thirty days thereafter to hear and determine all applications for the appointment of receivers in equity causes in this Court, and also his orders dated August 381 26th, 1932, and September 6th, 1932, appointing temporary receivers and receivers' counsel for the Interborough Rapid Transit Company, and a temporary receiver for Manhattan Railway Company, respectively, and why the American Brake Shoe and Foundry Company and the said temporary receivers should not be stayed from applying for permanent receivership pending the hearing and determination of the said order to show cause, and why independent receivers of the said Companies should not be appointed, and allowing the

382 *Petition of Benjamin F. Johnson.*

petition to be heard before the United States District Court, sitting *en banc*.

3. That since the service and filing of your petitioner's said bill and the order to show cause granted herein, the said Circuit Judge issued an additional order dated September 28th, 1932, continuing, during the pendency of the said equity cause entitled "American Brake Shoe and Foundry Company against Interborough Rapid Transit Company", the receivership of the defendant, Interborough Rapid Transit Company, and the appoint-
383 ment of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers thereof, and the receivership of the Manhattan Railway Company, and the appointment of William Roberts, as Receiver thereof, and reserving to the said Hon. Martin T. Manton, United States Circuit Judge, full right and jurisdiction over the said cause, and all proceedings therein, and extending the equity term of this Court by the Honorable Martin T. Manton, United States Circuit Judge, sitting as United States District Judge, until after the final determination and disposition of all matters in the said equity cause, and, in any event, for a period of three years from the date of the said order or decree.

384

4. Your petitioner avers that the said order of Hon. Martin T. Manton, United States Circuit Judge, dated September 28, 1932, was void, irregular, improper, and without legal justification, and your petitioner prays that the said order be vacated and set aside upon the grounds and allegations set forth in the bill of complaint and supplemental bill of complaint in this cause.

5. That your petitioner and complainant believes, and therefore avers, that the importance and significance

of this order to show cause makes it advisable that it should be heard by this Court, sitting *en banc*.

Wherefore, your petitioner and complainant respectfully asks the prayers for relief contained in the supplemental bill of complaint herein and in this order to show cause be granted by this Honorable Court.

That no previous application has been made for the relief herein sought.

Dated, New York, October 1st, 1932.

Benjamin F. Johnson
By (Signed) Charles Franklin
Solicitor.

(Signed) Charles Franklin

Charles Franklin,
Solicitor for Complainant,
Office & P. O. Address,
165 Broadway,
Borough of Manhattan,
New York City.

388

Order to Show Cause of October 3rd, 1932 on Petition of Lillian Boehm.

UNITED STATES DISTRICT COURT

For the Southern District of New York.

Benjamin F. Johnson,
Complainant,

against

389

Manhattan Railway Company, subject to leave of Court William Roberts, as Temporary Receiver of Manhattan Railway Company, Interborough Rapid Transit Company, subject to leave of Court Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company, The City of New York, and American Brake Shoe and Foundry Company,

390 Defendants.

In Equity
E. 71-153-1932.

Upon reading and filing the supplemental bill of complaint of the intervenor, Lillian Boehm, and the annexed petition of said intervenor, both verified October 3rd, 1932, and upon the bill of complaint of the complainant Benjamin F. Johnson herein, and the petition of Lillian Boehm for intervention, and the order dated September 21st, 1932, permitting her to intervene as a party plaintiff in this action, and upon all papers and proceedings had herein, and upon the bill of complaint in the equity cause entitled "American Brake Shoe and Foundry Company

Order to Show Cause of October 3rd, 1932 on Petition of Lillian Rochm.

v. Interborough Rapid Transit Company (E. 70 364), and upon all other proceedings heretofore had thereon, it is

ORDERED, that the above named defendants, or their attorneys, show cause before this Court at Room 235, Old Post Office Building, Park Row, Borough of Manhattan, New York City, on the 4th day of October, 1932, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why orders should not be issued:

(1) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 25, 1932, designating and assigning himself to hold a District Court of the United States for the Southern District of New York to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company.

(2) Vacating and setting aside order of Hon. Martin T. Manton, Circuit Judge, dated August 25, 1932, designating himself for a period of thirty days thereafter to hear and determine all applications for the appointment of receivers in equity causes in the United States District Court for the Southern District of New York.

(3) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, entered August 26, 1932 appointing Victor J. Dowling and Thomas E. Murray, Jr., as temporary receivers for Interborough Rapid Transit Company in the American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, et al. case (E. 70 364).

(4) Vacating and setting aside the order of Hon. Martin T. Manton, United States Circuit Judge, entered September 28, 1932, continuing, pendente lite, the Interborough receivership and the appointment of the re-

394 *Order to Show Cause of October 3rd, 1932 on Petition of Lillian Boehm.*

ceivers thereof, and reserving to the said Judge full right and jurisdiction over the said cause, and all proceedings thereof, and extending the equity term of this Court by the Hon. Martin T. Manton, U. S. Circuit Judge, until after the final determination and disposition of all matters in the said equity cause, and, in any event, for three years.

(5) Appointing independent receivers of the Interborough Rapid Transit Company.

395 (6) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 26, 1932 appointing Messrs. Chadbourne, Stanchfield & Levy, as Solicitors and General Counsel for the receivers of the Interborough Rapid Transit Company, as in violation of effective Rules, Practice and Procedure of this Court governing the qualifications of solicitors acting for receivers.

(7) Allowing intervenor to have the within petition heard before the United States District Court sitting *en banc.*

(8) That intervenor have such other and further re-
396 lief in the premises as to the Court may seem just and proper.

Sufficient reason appearing therefor, service of a copy of this order and the annexed petition upon each and all the defendants above-named, or their attorneys, on or before the 3rd day of October, 1932, shall be deemed sufficient service thereof.

Dated, New York, October 3rd, 1932.

WOOLSEY
U. S. D. J.

Petition of Lillian Boehm.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E. 71-153-1932.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of LILLIAN BOEHM, respectfully shows and represents that she is an intervenor in the above entitled cause.

1. That the above cause is a stockholder's suit brought on behalf of the Manhattan Railway Company stockholders, and all others similarly situated. For the contents of the bill and supplemental bill of complaint, and the proceedings had thereon, reference is made to

400 *Petition of Lillian Boehm.*

the bill and supplemental bill, and to the papers on file in the Office of the Clerk of this Court.

2. That your petitioner is a citizen and resident of the State of New York, and is the owner of $60,000. of First and Refunding Mortgage 5% Gold Bonds of the defendant, Interborough Rapid Transit Company due in 1966, and $35,000. of its Ten Year Secured Convertible 7% Gold Notes which became due on September 1st, 1932, and are now in default. That an order of intervention was granted to your petitioner on September 21st, 1932,
401 upon her petition permitting her to intervene as a party plaintiff in this action. That for the contents of the said petition and order of intervention, reference is made to the said petition and order on file in the Office of the Clerk of this Court.

3. Your petitioner avers that the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 25, 1932, designating and assigning himself to hold a District Court of the United States for the Southern District of New York to hear and determine all applications and proceedings in the matter entitled "American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company", and the order of Hon. Martin T. Manton,
402 U. S. Circuit Judge, dated August 25, 1932, designating himself for a period of thirty days thereafter to hear and determine all applications for the appointment of receivers in equity causes in the United States District Court for the Southern District of New York were each void, irregular, improper and without legal warrant or justification; your petitioner prays that said orders of Hon. Martin T. Manton, U. S. Circuit Judge, be vacated and set aside upon the grounds and allegations set forth in the intervenor's bill of complaint in this cause.

4. Your petitioner prays that the orders appointing temporary receivers for Interborough Rapid Transit Company, dated August 26, 1932, be vacated and set aside

upon the grounds and allegations set forth in the intervenor's bill of complaint.

5. That your petitioner prays that the order dated September 28, 1932, of Hon. Martin T. Manton, U. S. Circuit Judge, continuing, pendente lite, the Interborough receivership and the appointment of the receivers thereof, and reserving to the said Judge full right and jurisdiction over the said cause and all proceedings thereof, and extending the equity term of this Court by the Hon. Martin T. Manton, U. S. Circuit Judge, until after the final determination and disposition of all matters in the said equity cause, and, in any event, for three years, be vacated, and set aside upon the grounds and allegations set forth in the intervenor's bill of complaint.

6. That your petitioner avers that receivers should be appointed forthwith for the Interborough Rapid Transit Company upon the grounds and allegations set forth in the intervenor's bill of complaint herein.

7. That your petitioner avers that the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 26, 1932 appointing Messrs. Chadbourne, Stanchfield & Levy, as Solicitors and General Counsel for the receivers of the Interborough Rapid Transit Company, was and is in violation of the effective Rules and Practice and Procedure of this Court governing the qualifications of solicitors acting for receivers; that your petitioner and intervenor avers upon information and belief, that said designated attorneys for the receivers of Interborough, were during the period of one year prior to the date of August 26, 1932, directly and/or indirectly connected with the Interborough Rapid Transit Company, and Brooklyn-Manhattan Transit Company, their officers, bankers and other persons interested in the cause or interested in the receivership estate, as is more fully set forth in the bill of complaint herein.

406 *Petition of Lillian Boehm.*

8. That your petitioner and intervenor believes and therefore avers that the importance and significance of this order to show cause makes it advisable that it be heard by this Court sitting *en banc.*

WHEREFORE, your petitioner and intervenor respectfully asks that the prayers for relief contained in her supplemental bill of complaint herein, and in this order to show cause, be granted by this Honorable Court, and that receivers of Interborough Rapid Transit Company be appointed as prayed for.

407 That no previous or other application has been made for this relief, herein sought, by the intervenor.

The reason why this order to show cause is made returnable in less than the usual time is that an order to show cause upon the petition of the complainant herein has been granted and made returnable on October 4th, 1932, before this Court, praying for similar relief as stockholder of the defendant, Manhattan Railway Company, and it is essential to the interests of the complainant and this intervenor, and all others similarly situated, and advisable in the determination of the common questions raised in both orders to show cause, that both motions be heard and determined simultaneously.

408 Dated, New York, October 3rd, 1932.

LILLIAN BOEHM
Petitioner.

BOEHM & ZEIGER
Solicitor for Intervenor

LILLIAN BOEHM
Office & P. O. Address,
No. 30 Broad Street,
Borough of Manhattan,
New York City.

LOUIS BOEHM
Of Counsel.

Order Granting Lillian Boehm Leave to Intervene.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

Upon the annexed petition of LILLIAN BOEHM, verified September 21st, 1932, for leave to intervene as a party plaintiff in the above entitled action, and upon the annexed consent of the complainant herein, it is hereby

ORDERED, that LILLIAN BOEHM be, and she hereby is, permitted to intervene as a party plaintiff in the

412 *Order Granting Lillian Boehm Leave to Intervene.*

above entitled action upon such terms and conditions as the Court may hereafter impose, complainant agreeing, however, that counsel fees shall not be chargeable to the intervenor by plaintiff or plaintiff's attorney or counsel.

Dated, New York, September 21st, 1932.

FRANCIS G. CAFFEY
United States District Judge.

413 We do hereby consent to the entry of the foregoing order.

Dated, New York, September 21st, 1932.

CHARLES FRANKLIN
Attorney for Complainant.

414

Petition of Lillian Boehm For Leave To Intervene.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of LILLIAN BOEHM respectfully shows and alleges:

1.—I am the owner of 1400 shares of the capital stock of the defendant, MANHATTAN RAILWAY COMPANY, having a par value of $140,000. I have been the owner of said stock for more than a year last past. I am also the owner of $117,000. par value of first mortgage 4% bonds of the defendant, MANHATTAN RAILWAY COMPANY, due in April,

1990, which I have also owned for more than a year last past.

2.—I am and have been for more than a year last past the owner of $60,000. first and refunding 5% bonds of the defendant Interborough Rapid Transit Company, due in 1966, and am also the owner of $35,000. of its 7% secured bonds due on September 1st, 1932, and now in default.

3.—The above entitled action is brought by the complainant, a stockholder of the defendant, MANHATTAN
419 RAILWAY COMPANY (hereinafter called Manhattan), on behalf of himself and all other stockholders who may see fit to join in said suit, for the benefit of the defendant, MANHATTAN, for an accounting of all sums due and owing to the defendant, MANHATTAN, by the defendant, INTERBOROUGH RAPID TRANSIT COMPANY (hereinafter called Interborough), for the determination of the amount due by the Receivers of INTERBOROUGH to MANHATTAN for the use and occupation of MANHATTAN's properties, for the damages caused by the breach of the lease between MANHATTAN and INTERBOROUGH, or, in the alternative, for specific performance of said lease, for a determination of the respective rights and obligations of
420 MANHATTAN and INTERBOROUGH, for the vacation of the order of the Honorable Martin T. Manton, Circuit Judge, appointing himself as District Judge to hear the application for a receiver of the INTERBOROUGH, and for the vacation of his order appointing himself as an additional District Judge to hear all applications for appointment of receivers in equity causes in this District, for the vacation of the order entered August 26th, 1932, appointing temporary receivers for the INTERBOROUGH in the case of the American Brake Shoe & Foundry Co. *v.* Interborough, et al (E 70-374), for the vacation of the order made September 6th, 1932, appointing a temporary

receiver for MANHATTAN in the same case, and for the appointment of separate and independent receivers of the properties of MANHATTAN and of INTERBOROGH, respectively, and that the same be administered under the direction of this Court.

Your petitioner has had stated to her the substance of the complaint in the above entitled case, and is familiar with the facts therein alleged, and states, upon information and belief, that the facts and allegations therein contained are true as stated therein. Petitioner desires to intervene in said action and to become a party plaintiff thereto.

An order to show cause has been made herein requiring the defendants to show cause before this Court on September 23rd, 1932, why an order should not be made and entered herein appointing receivers of and for the property, assets, funds, business and records in the State of New York, of the defendants MANHATTAN, and INTERBOROUGH, respectively, pending the trial of this action, and enjoining and restraining the defendants from in any manner disposing of the money, property, assets, funds and business of the defendants, MANHATTAN and INTERBOROUGH, respectively.

WHEREFORE, your petitioner prays for an order permitting her to intervene as a party plaintiff in the above entitled action.

Dated, New York, September 21st, 1932.

LILLIAN BOEHM

424

Order Granting Manhattan Common Stockholders' Protective Committee Leave to Intervene.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

425 MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

E 71-153

426

Upon the annexed petition of Manhattan Railway Company Common Stockholders' Protective Committee, verified September 24, 1932, by said Committee, Brookin Corporation, and Llewellyn Hernly, for leave to intervene as party plaintiffs, on behalf of Manhattan Railway Company Common Stockholders' Protective Committee, composed of Nathan L. Amster, Chairman, Morton F. Stern, Hon. Peter Ten Eyck, C. R. Jeffers, Secretary, Blin W. Page and Charles Franklin, attorney for said Committee, in the above-entitled action, and on

behalf of Brookin Corporation and Llewellyn Hernly, who have deposited their stock with said Committee, it is hereby

ORDERED, (1) that the petitioners herein be and hereby are permitted to intervene as party plaintiffs on behalf of the Manhattan Railway Company Common Stockholders' Protective Committee, and represent all owners and holders of Manhattan Railway Company Common Stock who may deposit said stock with said Protective Committee in the above-entitled action upon such terms and conditions as to the court may appear just and proper; and

(2) that all notices of further motions and proceedings in the above-entitled cause shall be served on Charles Franklin, No. 165 Broadway, Borough of Manhattan, City of New York, counsel for said Protective Committee, pursuant to rules and practices of this court.

Dated, New York, Sept. 26, 1932.

FRANCIS G. CAFFEY
U. S. D. J.

CW

430 **Petition of Manhattan Railway Company's Common Stockholders' Protective Committee for Leave to Intervene.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

431 MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

432

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of Manhattan Railway Company's Common Stockholders' Protective Committee, composed of Nathan L. Amster, Chairman, Morton F. Stern, Hon. Peter Ten Eyck, C. R. Jeffers, Secretary, Blin W. Page, and Charles Franklin, attorney for said Committee, as a protective committee acting for Manhattan Railway Company Common Stockholders, on behalf of themselves and on behalf of Brookin Corporation and Llewellyn

Petition of Manhattan Railway Company's Common Stockholders' Protective Committee for Leave to Intervene.

Hernly, who have deposited their stock with said Committee, and on behalf of all other holders of such stock who may deposit their stock with the Protective Committee, respectfully shows as follows:

1. That the Protective Committee has been formed for the purpose of protecting the interests of all holders of the Manhattan Railway Company's Common Stock who shall deposit their stock with the Protective Committee.

2. The undersigned members of the Protective Committee themselves represent about 100,000 shares of the stock having a par value of $10,000,000; that Brookin Corporation, a Delaware corporation, is the holder of 3,000 shares having a par value of $300,000, and has deposited said stock with said Committee, as has Llewellyn Hernly, a holder of 500 shares having a par value of $50,000. Other holders of large amounts of the stock have also agreed with the Protective Committee to deposit their stock with the designated depository of the Protective Committee. The Protective Committee has called for the deposit of stock, and a published notice to that effect will shortly appear.

3. On September 21, 1932, a suit in equity was brought by Benjamin F. Johnson, one of the common stockholders of Manhattan Railway Company, wherein and whereby Johnson asked to have the present appointment of the receivers of Interborough Rapid Transit Company, namely, Hon. Victor J. Dowling and Mr. Thomas E. Murray, Jr., and the receiver of Manhattan Railway Company, Mr. William Roberts, vacated and set aside as irregular, null, and void, and without legal effect, and that proper and independent receivers be appointed for said Interborough Rapid Transit Company and Manhattan Railway Company.

436 *Petition of Manhattan Railway Company's Common Stockholders' Protective Committee for Leave to Intervene.*

4. Your petitioners are informed and believe that numerous questions of great importance, vitally affecting the interests of the stock represented by the Protective Committee, will be raised in the above-entitled cause, and will come before this court for its decision thereon. Your petitioners refer to the bill of complaint herein of Benjamin F. Johnson, plaintiff (E 71-153), wherein the facts with regard to certain of these matters are set forth at length.

437 5. Your petitioners, as such Protective Committee, allege that, in view of the importance to the stock which they represent of the questions which shall arise from time to time in this case, they should be permitted to intervene in this cause.

Wherefore, your petitioners pray that an order be entered herein, permitting your petitioners, as the Protective Committee acting for the Manhattan Railway Company common stockholders, to intervene as party plaintiffs in this cause, with the right to plead on behalf of the holders of said stock, and to be heard on all matters arising on this cause, and that your petitioners be
438 entitled to notice of all proceedings herein, and that your petitioners have such other and further relief as to this court may seem just and proper.

Dated, New York, September 24, 1932.

Nathan L. Amster, Chairman,
Morton F. Stern,
Hon. Peter Ten Eyck,
C. R. Jeffers, Secretary,
Blin W. Page, and
Charles Franklin
As the Protective Committee for
Manhattan Railway Company
Common Stockholders
By Charles Franklin,
Attorney.

Petition for Contingent Intervention by Harold Palmer and Others as the Protective Committee for Holders of Manhattan Seven Per Cent. Guaranteed Stock.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court, VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E-71-153-1932

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

FIRST: Your petitioners, Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, all of whom may be hereinafter referred to as the Protective Committee, are the same petitioners who, in the cause pending in this Court numbered E-70-364, entitled The American Brake Shoe and Foundry Company *vs.* Interborough Rapid Transit Company, and acting as a Protective Committee for the Seven Per Cent. Guaranteed Stock of Manhattan Railway Company (hereinafter called Manhattan), petitioned this Court by

442 *Petition for Contingent Intervention by Harold Palmer and Others as the Protective Committee for Holders of Manhattan Seven Per Cent. Guaranteed Stock.*

petition dated September 8, 1932, and by amended and substituted petition dated September 12, 1932, for leave to intervene, and to whom, by order of September 28th, 1932, his Honor Judge Martin T. Manton sitting in this cause, allowed intervention therein, said petition, motion and order, being now incorporated herein by reference, unless the Court should otherwise direct, for their being considered in this Court as a basis for relief as prayed hereunder; and your petitioners further respectfully
443 state:

SECOND: 1. That, as set forth in paragraphs 18 to 24 of the bill of complaint herein, the 600,000 shares of Manhattan stock are in two separate, and, on information and belief, mutually antagonistic classes, namely, (a) the 556,490 shares called "modified stock" (of which the complainant, Benjamin F. Johnson, on information and belief, owns the 100 shares mentioned by him in his bill of complaint herein) which in May, 1922 surrendered their right under Manhattan's lease of January 1, 1903, to Interborough to receive from Interborough an annual payment of $7.00 per share; and (b) the 43,510 shares
444 of what is called "seven per cent. guaranteed stock" which has never surrendered said right to receive from said Interborough said annual payment of $7.00 per share, of which said class of 43,510 shares of guaranteed stock the Protective Committee, petitioners herein, having made its first call for deposits on September 26, 1932, now hold or represent between 9,000 and 10,000 shares, and expect within a reasonable time to enlist many more shares.

2. That said obligation of Interborough under said lease to holders of seven per cent. guaranteed stock as set forth in the Protective Committee's said petitions in cause numbered E-70-364, is an obligation which, as

established by the Courts of New York, runs directly from Interborough to each stockholder of Manhattan so that such stockholder may properly sue Interborough to enforce the same without impleading Manhattan as a party to such suit; and that said obligation, being an express obligation to make such seven per cent. annual payments as part rental for the Manhattan properties, is, and has for years been treated by Interborough as being, an operating charge prior to any claim of any secured or unsecured creditor, or of any stockholder of Interborough, or of any bondholder of Manhattan; and that any Receivers of Interborough using or occupying the properties of Manhattan are obligated to pay said seven per cent. upon said guaranteed stock as such prior operating charge to the holders thereof.

3. That as set forth by the Protective Committee in its said petitions for intervention in said cause E-70-364, Manhattan itself, under said Manhattan-Interborough lease of January 1, 1903, was to receive directly as rental only $10,000 in cash per annum, namely, less than 1/100th of one per cent. of the capital invested in Manhattan's properties, the balance of said rental being expressly payable, *as rental,* by Interborough directly in the form of (a) taxes, assessments, etc., (b) an annual dividend of seven per cent. on each share of Manhattan stock, and (c) interest on all bonds of Manhattan; that on information and belief, before said modifying agreement of May 1, 1922, mentioned in section one of this paragraph Second, Interborough was making annual payments aggregating about $4,200,000 in such dividend rentals, and about $1,800,000 in four per cent. interest on Manhattan's outstanding bonds, a total in such dividend and interest rentals of about $6,000,000; that by the terms of said modification agreement of May, 1922, said total of annual dividend rentals was reduced by about

448 *Petition for Contingent Intervention by Harold Palmer and Others as the Protective Committee for Holders of Manhattan Seven Per Cent. Guaranteed Stock.*

$3,900,000; thus leaving payable annually by Interborough in dividend and interest rental the sum of about $2,100,000 of which only about $304,570 is now payable annually to the holders of Manhattan seven per cent. guaranteed stock.

4. That as set forth in section 3 of this paragraph Second, Manhattan itself receives no real consideration whatever under said lease and is not actually interested in protecting it from disaffirmance or from default at
449 the hands of the Receivers of Interborough, whoever they may be; that the holders of Manhattan four per cent. mortgage bonds are, on information and belief, adequately protected by their security, and that the complainant Benjamin F. Johnson and the other holders of over ninety per cent. of Manhattan stock, namely, the "modified stock", as to which the right to dividend rentals has been so surrendered, are, on information and belief, not interested in preventing disaffirmance of said Manhattan-Interborough lease, or any default thereunder, but, on the contrary might benefited by such disaffirmance or default, and in equity can, therefore, not
450 represent the interest of the seven per cent. guaranteed stock under said Manhattan-Interborough lease; that on information and belief Interborough or its Receivers have funds amply adequate to pay the quarterly instalment of guaranteed rental dividends of $1.75 per share, —namely, $76,142.50, out of funds on hand which exceed $4,000,000, but that there are no creditors, secured or unsecured, or stockholders of Interborough who are interested in, or who would favor payment thereof; and that your petitioners believe that some of such creditors and stockholders are prepared to oppose and obstruct, such payment, and to lend support to any proposal by Receivers of Interborough that said Manhattan-Interborough lease be disaffirmed; that your petitioners be-

lieve and state that Interborough and its Receivers, both in law and equity are, and while operating Manhattan's properties, will continue to be, obligated to the holders of said seven per cent. guaranteed stock for said dividend rentals under said lease.

Third: That if, upon the motion of the complainant herein, Benjamin F. Johnson, this Honorable Court should vacate and set aside certain orders heretofore entered in said cause E-70-364 appointing Receivers for Interborough and should appoint another receiver or other receivers for Interborough, or should through a regularly incumbent District Court Judge, take control of the present Receivers of Interborough, then, the rights and interests of your petitioners and those whom they now represent and will hereafter come to represent, could not, as your petitioners believe and state receive proper protection unless your petitioners as such Protective Committee should be allowed by order of this Court to intervene and become parties to this proceeding, and thus (a) receive notice of, and have opportunity to be heard on, any proposed course by such new Receiver or of this Court relating to payment or non-payment of said October 1st instalment of guaranteed rental, or (b) to be able themselves to bring up to the Court for submission their contention that such instalment should as an operating charge be paid by the Receivers of Interborough, or any default thereon be cured by them.

Fourth: That if an order or orders of the character or scope mentioned in paragraph Third above of this petition should be entered by this Court, then your petitioners seek herein an order of this Court allowing your petitioners, as such Protective Committee, to intervene as a party defendant in this proceeding to assert

454 *Petition for Contingent Intervention by Harold Palmer and Others as the Protective Committee for Holders of Manhattan Seven Per Cent. Guaranteed Stock.*

their rights as hereinbefore set forth, strictly in subordination to the main proceeding herein, and would ask that this petition, as it now stands or as it may be amended, be, after such order allowing intervention shall have been entered herein, treated as their cross-petition against said Intrborough and such receiver or receivers thereof as this Court may appoint or come to recognize.

Wherefore, if orders should be entered in this cause of the character or scope mentioned in paragraph Third
455 hereof, your petitioners pray that this Court, upon entry of such order or orders, will also enter a further order permitting your petitioners as the Protective Committee for holders of Manhattan Railway Company seven per cent. guaranteed stock, to intervene as a party defendant in this cause, and for such other and further relief to it and to those whom it may represent or may hereafter come to represent, and to all such stockholders, as to this Court may seem proper.

Dated, September 29, 1932.

Marshall & Wehle,
Louis B. Wehle,
456 Solicitors.

Harold Palmer,
Norman Johnson,
Stanley R. Latshaw,
Harold Swain,
John W. Appel, Junior,
as the Protective Committee
for Seven Per Cent. Guaranteed Stock of Manhattan
Railway Company
by Harold Palmer,
Chairman
Norman Johnson,
Secretary.

American Brake Shoe Bill of Complaint.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

To the Judges of the District Court of the United States for the Southern District of New York:

The plaintiff, The American Brake Shoe and Foundry Company, a corporation duly organized and existing under the laws of the State of Delaware, and a citizen of said state, brings this, its Bill of Complaint, on its behalf and on behalf of all other creditors of the Interborough Rapid Transit Company, the defendant, who may hereafter join in the prosecution of this suit, against the Interborough Rapid Transit Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said state, resident in the Southern District of New York, and thereupon plaintiff alleges as follows:

460 *American Brake Shoe Record: Bill of Complaint.*

FIRST: The plaintiff, The American Brake Shoe and Foundry Company, is a corporation duly organized and existing under the laws of the State of Delaware, and a citizen and resident of said state.

SECOND: On information and belief, that the defendant was at all times hereinafter mentioned, and is now, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen of said state, having its principal office in the City of New York, and a resident of the Southern District of New York.

THIRD: That this is a suit of a civil nature in equity; that the matter in dispute exceeds the sum of Five thou-
461 sand ($5,000) Dollars, exclusive of interest and costs, and is between citizens of different states.

FOURTH: On information and belief, that the defendant, Interborough Rapid Transit Company, is a railroad corporation duly formed on or about May 6, 1902, under and in pursuance of Chapter 565 of the laws of 1890 of the State of New York, known as the Railroad Law, and the acts amendatory thereof and supplemental thereto, and pursuant to the provisions of Chapter 544 of the laws of 1902 of the State of New York, being an Act entitled "An Act to Amend Chapter 4 of the Laws of 1891, entitled 'An Act to Provide for Rapid Transit Railways in Cities of Over One million Inhabitants,'" for the pur-
462 pose, among others, of equipping and operating rapid transit railroads in the City of New York.

FIFTH: On information and belief, that on or about February 21, 1900, the City of New York, acting by the Board of Rapid Transit Railroad Commissioners, entered into a contract with John B. McDonald (known as Contract No. 1) for the construction, at the expense of the City, and for the equipment, maintenance and operation of certain rapid transit lines, subway and elevated, in

the Boroughs of Manhattan and the Bronx, in said city, known as the "Manhattan-Bronx Rapid Transit Railroad," which said contract, including the provisions thereof relating to the equipment, maintenance and operation of said railroad, was subsequently duly assigned to defendant in the manner required by law.

On information and belief, that on or about July 21, 1902, the City of New York, acting by the Board of Rapid Transit Railroad Commissioners, under the Rapid Transit Act, entered into a contract with Rapid Transit Subway Construction Company (known as Contract No. 2) for the construction, at the expense of the City, and for the equipment, maintenance and operation of certain rapid transit subway lines in the Boroughs of Manhattan and Brooklyn in said city, known as the "Brooklyn-Manhattan Rapid Transit Railroad," which said contract, including the provisions thereof relating to the equipment, maintenance and operation of said railroad, was subsequently duly assigned to the defendant in the manner required by law.

On information and belief, that on or about March 19, 1913, the City of New York, acting by the Public Service Commission for the First District, under the Rapid Transit Act, entered into a contract with defendant (known as Contract No. 3) for the construction by the City, in part at the expense of said City, and in part at the expense of the defendant, of certain rapid transit lines in the Boroughs of Manhattan, Bronx, Queens and Brooklyn, and for the equipment, maintenance and operation of the rapid transit lines to be constructed under said contract in conjunction with said Manhattan-Bronx Rapid Transit Railroad and said Brooklyn-Manhattan Rapid Transit Railroad then operated by the defendant under said Contract No. 1 and under said Contract No. 2.

On information and belief, that the defendant is now engaged in the maintenance and operation of all of said rapid transit railroads, including the new lines constructed

under said Contract No. 3, so far as the same have been completed by the City of New York.

On information and belief, the said system of rapid transit railroads now maintained and operated by the defendant under said contracts, consists of more than seventy-six (76) miles of continuous railroad, and more than two hundred sixty-two (262) miles of single track in all boroughs of the City of New York except the Borough of Richmond, and the defendant employs more than eighteen thousand men.

SIXTH: On information and belief, that on or about January 1, 1903, by indenture of lease bearing said date,
467 Manhattan Railway Company, a railroad corporation organized and existing under the laws of the State of New York, owning a system of elevated railroads in the Boroughs of Manhattan and the Bronx, of the City of New York, leased the said system of elevated railroads to the defendant for the term of nine hundred and ninety-nine (999) years from November 1, 1875, upon the terms and conditions, and for the rentals in said indenture of lease set forth.

On information and belief, that on or about March 19, 1913, the Public Service Commission for the First District issued to said Manhattan Railway Company, and said Manhattan Railway Company accepted, a certain certificate for the construction, equipment, maintenance and
468 operation of certain additional tracks to certain elevated lines of said Manhattan Railway Company, and that said additional tracks have been constructed and equipped and are now operated by the defendant under said lease.

On information and belief that on or about March 19, 1913, the Public Service Commission for the First District issued to the defendant, and the defendant accepted, a certain certificate for the construction, equipment, maintenance and operation of certain extensions to the elevated lines, or some of them, operated by the defendant under

said lease; and that said elevated extensions have been constructed and equipped and are now operated by the defendant under the terms of said certificate in conjunction with, and as a part of the elevated system leased by the defendant from said Manhattan Company.

On information and belief, that said elevated railroad system, including said additional tracks and elevated extensions now operated by the defendant, consists of more than forty-one (41) miles of railroad and more than one hundred thirty-seven (137) miles of single track in the Boroughs of Manhattan and the Bronx, in the City of New York.

SEVENTH: On information and belief, that the cost to defendant of the Elevated third tracks, Elevated Extensions and Manhattan power plant improvements constructed and furnished in accordance with the provisions of the aforesaid Manhattan and Interborough Certificates each granted March 19, 1913, is in excess of $44,000,000, all of which cost was provided from the proceeds of the sale of bonds and notes issued by defendant.

EIGHTH: On information and belief, that in and by the documents and agreements which taken together are known and described as the "Interborough-Manhattan Readjustment Plan of 1922," among other things, it was provided that as to all holders of capital stock of Manhattan Railway Company who might assent to and participate in such Plan the 7% annual rate of guaranteed dividend rental on such capital stock as fixed in the aforesaid lease from the Manhattan Railway Company to defendant should be reduced, after July 1, 1924, to the rate of 5% per annum and should be payable only if and to the extent earned by defendant in the manner in said Plan provided; that the holders of more than 90% of the outstanding capital stock of Manhattan Railway Company assented to said Plan and agreed to accept said reduced rent; that the reduced dividend rental on said capital stock of Manhattan

Railway Company as and when earned at the rates provided in the said Readjustment Plan has been paid by defendant; that the Manhattan Railway Company has formally expressed its dissatisfaction with accounts of defendant for the period subsequent to June 30, 1928, and has claimed that the dividend rental on its stock for such period is greater than the payments which defendant has made.

NINTH: On information and belief, that under said Contract Nos. 1, 2 and 3, it is, among other things, provided that in case the defendant shall be in unexcused default in the payment of the rental, or in the performance
473 of any other of the obligations of said contracts, and any such default shall continue for the period or periods therein stated, the said contracts may be terminated on the terms and conditions therein set forth.

On information and belief, that under the said lease from Manhattan Railway Company and the said Interborough-Manhattan Readjustment Plan it is, among other things, provided that in case the defendant shall fail to pay the rent provided for in said lease, as reduced in accordance with the provisions of said Plan, and such default shall continue for the period therein stated, the leasehold estate thereby created may be terminated.

TENTH: On information and belief, that the defendant has an authorized capital stock issued and outstanding
474 of Thirty-five million dollars ($35,000,000); that all of the equipment provided by the defendant under said Contracts Nos. 1 and 2, including the power houses, sub-stations and rolling stock provided under said contracts and all the right, title and interest of the defendant in said contract number 3, said lease from the Manhattan Railway Company and the said certificate for elevated extensions issued to the defendant and certain other property and assets of the defendant have been heretofore pledged under and are now subject to the First and Refunding Mortgage

of the defendant, dated March 20, 1913, to Guaranty Trust Company of New York as Trustee, under which there are now issued and outstanding in the hands of the public bonds to the principal amount of more than One hundred and thirty-two million ($132,000,000) dollars, and under which there are now outstanding bonds to the additional amount of more than Fifty-four million dollars ($54,000,000), pledged to secure an issue of Ten Year Secured Convertible 7% Gold Notes of the defendant, due September 1, 1932, of which there are outstanding, in the hands of the public, notes to the principal amount of Thirty-one million, six hundred and seventy-two thousand one hundred dollars ($31,672,100); that there are also issued and outstanding in the hands of the public defendant's Unsecured Ten Year Six per cent. Gold Notes, due October 1, 1932, in the principal amount of Ten Million five hundred thousand dollars ($10,500,000); that interest on said First and Refunding Mortgage 5% Gold Bonds of the defendant is due and payable on the first days of January and July in each year; that interest on said Ten Year Secured Convertible 7% Gold Notes is due and payable on the first days of March and September in each year; and that interest on said Unsecured Ten Year Six per cent. Gold Notes is due and payable on the first days of April and October in each year.

ELEVENTH: On information and belief, the lease from said Manhattan Railway Company provides that the defendant shall pay rental for the elevated lines demised by said lease, in addition to all taxes on the lessor and its property, the following:

> Seven per cent. (7%) per annum on the authorized and outstanding capital stock of said Manhattan Railway Company to the aggregate par value of Sixty million dollars ($60,000,000), payable quarterly to the owners of record of the shares of said stock, on the first days of January, April, July and October in each

478 *American Brake Shoe Record: Bill of Complaint.*

year, but as to 556,490 shares of said capital stock the dividend rental rate has been reduced to 5% per annum, payable if earned, as hereinabove.

Four per cent. (4%) per annum on the Consolidated Mortgage 4% bonds of said Manhattan Railway Company of which Forty million six hundred and eighty-three thousand dollars ($40,683,000), are now outstanding, payable semi-annually on the first days of April and October in each year.

Four per cent. (4%) per annum on the Second Mortgage Bonds of said Manhattan Railway Company of which Four million five hundred and twenty-three
479 thousand dollars ($4,523,000) are now outstanding, payable on the first days of June and December in each year.

TWELFTH: Plaintiff is informed and believes that the defendant is and will be unable to pay at maturity its Ten-Year Secured Convertible 7% Gold Notes due September 1, 1932, and this plaintiff alleges that some of the over five thousand noteholders may bring suits in respect of their said notes and may levy execution on the equipment and property of the defendant used in the operation of said rapid transit subway and elevated lines; that failure to meet the interest on said First and Refunding Mortgage 5% Gold Bonds when due may operate as a
480 default under the mortgage securing the same and render such mortgage enforceable; and that failure to pay the interest when due on said bonds of Manhattan Railway Company may operate as a default under said lease and upon the expiration of the period of grace therein provided will render the same terminable; and that failure to pay each installment of rental under said lease, when due, payable to the holders of 43,510 shares of the stock of said Manhattan Railway Company, who did not assent to the Readjustment Plan of 1922, may also operate as a default under said lease and will subject the defendant to innumer-

able actions by the holders of said stock to collect the same by reason of the guarantee by the defendant of the payment of such rental when due to each of the holders of such stock.

THIRTEENTH: On information and belief, that defendant has failed and neglected to pay certain taxes for 1928 and 1929 duly assessed by the City of New York against various parcels of real estate owned by defendant and subject to the lien of its First and Refunding Mortgage, and that such unpaid taxes with the interest now due thereon amount in the aggregate to more than $480,000; that defendant's failure to pay such real estate taxes as and when the same became due, or within a period of ninety (90) days thereafter, constitutes an act of default (which has continued down to date), under the provisions of defendant's First and Refunding Mortgage and makes it subject to an action to foreclose the lien of said Mortgage.

On information and belief, that defendant has neglected and failed to pay certain taxes for 1932 duly assessed by the City of New York against the special franchises and real estate belonging to the Manhattan Railway Company, the amount of such unpaid taxes with interest now due thereon being in excess of $860,000; that defendant's lessor, Manhattan Railway Company, has formally demanded in writing that such taxes be paid but that defendant has neglected and failed and continues to neglect and fail to comply with such demand and make such payment; on information and belief that such failure and such refusal constitutes an act of default on the part of the defendant under the aforesaid lease from the Manhattan Railway Company and if continued for a period of ninety (90) days from the date of demand of the Manhattan Railway Company, will constitute an additional act of default under the terms of the defendant's First and Refunding Mortgage.

FOURTEENTH: On information and belief, that the Transit Commission, being the Metropolitan Division of Public Service of the State of New York, purporting to act in its regulatory capacity, or as agent of the City of New York under Contract No. 3, or both, by order dated April 30, 1930, directed the defendant to provide 289 new steel cars ready for subway operation not later than October 1, 1931, together with the necessary power equipment; that thereafter on September 4, 1930, the aforesaid Transit Commission commenced an action or proceeding against the defendant, under the Rapid Transit Act and Section 57 of the Public Service Law, for the enforcement
485 of said order in the Supreme Court, State of New York, which action or proceeding is still pending and is now set down for trial on October 3, 1932; that the cost to defendant of compliance with the aforesaid order of the Transit Commission would be approximately $8,000,000.

On information and belief, that the Transit Commission, being the Metropolitan Division of Public Service of the State of New York, purporting to act in its regulatory capacity or as agent of the City of New York under Contract No. 3, or both, by order dated April 21, 1926, directed the defendant to lengthen certain of its subway local station platforms and furnish in connection therewith 382 new steel subway cars for operation together with the necessary power equipment; that for the purpose of carrying out said order the said Transit Commission
486 acting as aforesaid, by a supplemental order dated December 31, 1927, directed the defendant to lengthen certain local subway station platforms among others at Canal Street and Spring Street and on September 4, 1930, commenced an action or proceeding against defendant, under the Rapid Transit Act and under Section 57 of the Public Service Law, in the Supreme Court, State of New York, for the enforcement of said supplemental order of December 31, 1927, which action or proceeding is still pending and is now set down for trial on October 3, 1932; that

said order of December 31, 1927, is supplemental to the order of April 21, 1926, and is one step in carrying out the same; that the cost to defendant in carrying out said order of April 21, 1926, would be approximately $20,000,000.

On information and belief, that the Transit Commission, being the Metropolitan Division of the Public Service of the State of New York, by order dated June 29, 1927, directed the defendant to install a certain signal system upon its subway and elevated lines, which said order was duly accepted; that this installation was to be consummated year by year; and that following the terms of said order the cost of the remaining signal installation year by year would be approximately as follows: for fiscal year ended June 30, 1933, $720,000; 1934, $980,000; 1935, $1,750,000; 1936, $3,510,000; 1937, $3,000,000.

On information and belief, that defendant presently is without funds to enable it to comply with any of the aforesaid orders or directions, if enforced, and has no means of obtaining such funds.

On information and belief, that the aforesaid Transit Commission, acting as agent for the City of New York, has questioned the propriety and legality of certain charges which the defendant has made against subway revenues and included within operating expenses for the two years ended June 30, 1931, and that the total of the items so questioned is in excess of $811,000; that the said Transit Commission has indicated its intention of filing with the defendant formal objections to the items so questioned and that it may file such objections at any time; that under the provisions of Contract No. 3, if, as and when any such objections are filed with the defendant the latter is obliged to forthwith transfer the amount of such items to a special suspense account and if it is subsequently determined, in the manner provided in the Contract, that the objections are well founded, then the defendant is obliged to return to subway revenues any and all amounts so found to have been erroneously, improperly, or illegally charged against such revenue.

FIFTEENTH: That the defendant is indebted to the plaintiff in the sum of Twenty-seven thousand five hundred thirty and eighty-nine one-hundredths dollars ($27,530.89), for brake shoes and miscellaneous castings furnished and supplied by plaintiff to the defendant at the request of the defendant and for which the defendant agreed to pay plaintiff said sum; that payment of said sum has been duly demanded by plaintiff from the defendant, but refused, and the same is now wholly due and unpaid; that said materials were so supplied to the defendant for the purposes of the operation of its system of elevated and rapid transit subway lines and to enable the defendant to comply with and fulfill its obligations under said con-
491 tracts, certificates and lease, and to fulfill the duty which the defendant owes toward the public, and to discharge the obligations of the defendant and of said Manhattan Railway Company under the contracts, certificates and franchises for the operation of their respective lines, and that the materials were used for the purposes aforesaid.

On information and belief, that the defendant has outstanding floating indebtedness for materials, equipment, taxes and supplies to the amount of over Two million five hundred thousand ($2,500,000.00) Dollars; that said floating indebtedness is now overdue; that the defendant is unable to pay the same; and that the holders thereof are pressing for payment thereof; that some of said creditors may bring suits in respect of their said claims and may
492 levy execution on the equipment and property of the defendant used in the operation of said rapid transit subway and elevated lines and on the material and supplies and other property of defendant on hand and kept by the defendant for necessary use in operating said railway systems, and plaintiff alleges that there is grave danger that the defendant may thereby be deprived of the use of equipment, rolling stock and other property essential to the effective and economical operation of the said railroad systems, and that there is likewise grave danger that suits may be instituted against the defendant in respect

of the claims above stated, and that it is essential to the interest of all the creditors of the defendant and to the interest of the public and of the plaintiff that the property of the defendant should not be sacrificed; that the position of defendant, and therefore of all the creditors of the defendant, including the plaintiff, is rendered more insecure by reason of the present bad financial situation of public service corporations generally and the general financial depression.

On information and belief, that defendant is and will be without financial resources to meet in full the following contractual obligations which are required of it because of the terms of its Mortgage, the Indenture securing its Notes, and the Manhattan lease:

(a) six months' interest on its Ten Year Secured Convertible 7% Gold Notes, due and payable September 1, 1932, amounting to $1,108,523.50;

(b) the principal of said Ten Year Secured Convertible 7% Gold Notes, due and payable September 1, 1932, amounting to $31,672,100;

(c) six months' interest on the Unsecured Ten Year Six per cent. Gold Notes, due October 1, 1932, amounting to $315,000;

(d) the principal of said Unsecured Ten Year Six per cent. Gold Notes, due and payable October 1, 1932, amounting to $10,500,000;

(e) rental payments due under the lease from Manhattan Railway Company, amounting to $914,802.50, on October 1, 1932, being interest on the Manhattan 4% Bonds and rental for one quarter on the non-assenting Seven per cent. Stock of the Manhattan Company;

(f) rental payments due under the said Manhattan lease on December 1, 1932, amounting to $90,460;

(g) the interest and sinking fund due on defendant's First and Refunding Mortgage 5% Gold Bonds, due on January 1, 1933, in an amount in excess of $4,400,000.

SIXTEENTH: On information and belief, that the only means whereby the defendant can meet its obligations under said contracts, certificates and leases, and pay its floating indebtedness and discharge its current obligations is by the continued maintenance and operation of said railroads by an uninterrupted use thereof; and that any suits upon or process against its properties or its revenues would seriously embarrass and cripple the defendant and
497 diminish, if not destroy, its power successfully to operate said railroad systems; that said railroad systems, together with all their appurtenances, rolling-stock and other property connected therewith, are now in a reasonably good state and condition; that during the last year the elevated and rapid transit subway lines operated by the defendant carried over 1,000,000,000 passengers, and that it is of vital importance to the people of the City of New York that said elevated and rapid transit subway lines shall continue to be operated and to such end it is of like importance that said systems be preserved; that notwithstanding the fact that every effort has been made to provide funds for the payment of the indebtedness of the defendant, and to procure additional income and revenues
498 from the operation of said elevated and rapid transit subway lines, such efforts have proved unsuccessful; that unless some definite action is taken on behalf of all the creditors so that the operation of said railroads may be continued, great and severe loss and irreparable injury will be inflicted upon all creditors; that the credit of the defendant has been seriously impaired; and that it has no reasonable hope of finding assistance from any quarter.

On information and belief said defendant has assets which at a fair valuation exceed the amount of its liabilities; the defendant is unable to pay or provide for the payment of its obligations now due and will be unable

to meet its obligations in the ordinary course of its business as they become due.

Plaintiff further alleges on information and belief that unless the Court, in view of the facts above set forth shall take said railroad systems of the defendant into judicial custody for the protection of every interest therein, that immediately upon default, individual creditors, and particularly individual holders of the Ten Year Secured Convertible 7% Gold Notes of the defendant will assert their rights and remedies in different courts; that the result will be a multiplicity of suits and a race of diligence; that attempts will be made to secure judgments and priorities, that levies will be made upon cars, rolling stock, 50
material and supplies indispensable to the operation of said railroad systems which will greatly interfere with and ultimately prevent defendant from the proper performance of its duties as a common carrier and will seriously diminish its earnings.

On information and belief, that an attempt by plaintiff to enforce at law its claims as a general creditor would precipitate similar action on the part of other creditors; and this in turn would lead to wasteful strife and controversy, which plaintiff believes can be avoided and the property preserved for equitable distribution among those entitled thereto, only by the intervention of a Court of Equity and the granting of equitable relief, including the appointment of a receiver, which will lead to a realization for all of the creditors of a substantially larger amount 501
than if such relief were not granted.

SEVENTEENTH: That, under the circumstances, the interference of a Court of Equity for the protection of plaintiff's rights is imperatively required and especially for the time being the appointment of a receiver to take charge of and preserve the property of the defendant, continue the operation of its railroad systems for the accommodation of the public, and collect and receive and properly appropriate the income thereof until the final decree of the Court in the premises.

EIGHTEENTH: Plaintiff has no adequate remedy at law for its aforesaid grievances and can have relief only in equity, and plaintiff, therefore, files this bill of complaint in behalf of itself and other creditors of the defendant who may come in and contribute to the expenses hereof and prays for equitable relief as follows:

1. That the rights of the plaintiff and of all creditors of the defendant may be ascertained and decreed and that the Court will fully administer the fund in which the plaintiff is interested, constituting the entire railroad systems and other assets of the defendant and will for such purpose marshal and administer all the assets of the de-
503 fendant and ascertain the several and respective liens and priorities existing thereon, and enforce by decree the rights, liens and equities of the creditors of the defendant, as the same may be finally ascertained and decreed by the Court.

2. That pending such marshalling and administration and final decrees, for the purpose of preserving intact the property and assets of the defendant a receiver or receivers may be appointed for the defendant and of all the property and assets of the defendant real, personal and mixed of whatsoever kind and description and wheresoever situated, including all railroads, leased or operated, tracks and terminal facilities, rolling stock, franchises, leases, contracts, certificates, rights and properties, with full
504 power to sue for, collect, receive and take into his possession, goods, chattels, credits, rights, moneys, effects, lands, tenements, books, papers and property and assets of every description of the defendant, and with all the incidental powers ordinarily vested in receivers in like cases and with full power and authority to operate the railroads, property and assets of the defendant, and to collect and receive all the rents, issues and profits and income thereof, and to apply the same under the orders or decrees of this Court for such period as the Court shall order, to protect

and preserve the corporate franchises, privileges and property and to preserve the corporate existence of the defendant and to protect and preserve the said railroads, property and assets from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and to do any and all acts and things which may be necessary to preserve the valuable rights, contracts and franchises of the defendant or otherwise requisite or proper.

3. That temporarily and pending this suit an injunction may issue against the defendant and all persons claiming and acting by, through and under it, and all other persons, to restrain them from interfering with said receiver or receivers taking possession of said property, and that plaintiff may have such further relief in the premises as the nature of the case may require and as may be agreeable to equity.

4. That the defendant be required to answer all and singular the matters above stated but not under oath, answer under oath being hereby expressly waived.

5. That a writ of subpoena may be granted to the plaintiff to be directed to the defendant thereby requiring said defendant personally to be and appear on a certain day before the Court and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and further to perform and abide by such further order, direction or decree therefor, as to the Court shall seem meet.

6. That plaintiff have such further and other relief as the Court may deem proper and equitable.

BREED, ABBOTT & MORGAN,
Solicitors for Plaintiff.

WINFRED K. PETIGRUE,
of Counsel.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

FRANK H. JANKE, being duly sworn, deposes and says that he is the Assistant Treasurer of The American Brake Shoe and Foundry Company, the plaintiff named in the foregoing bill of complaint; that he makes this affidavit for and in its behalf and is duly authorized to do so; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true; that the sources of deponent's knowledge and the grounds of his belief as to all matters not stated upon plaintiff's own knowledge are as follows: deponent has made inquiries concerning the present condition of the defendant Interborough Rapid Transit Company, and from such inquiries has obtained the information concerning the facts alleged in said bill of complaint upon information and belief.

FRANK H. JANKE.

Subscribed and sworn to before me
this 25th day of August, 1932.

ISAAC DAVIS HALL,
Notary Public,
Queens County.
Queens Co. Clerk's No. 3026, Reg. No. 3131.
N. Y. Co. Clerk's No. 838, Reg. No. 4H514.
Commission Expires March 30, 1934.
(Notarial Seal)

(*Endorsed*)

U. S. District Court
Filed
August 26, 1932
S. D. of N. Y.

Interborough Answer in American Brake Shoe Case. 51

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

51:

INTERBOROUGH RAPID TRANSIT COMPANY, the defendant in this cause, for answer to the bill of complaint herein, or unto so much and such parts thereof as the defendant is advised it is necessary or material for this defendant to make answer, answering says:

FIRST: The defendant admits all the allegations of said bill of complaint.

SECOND: The defendant, reiterating the admissions of the preceding article "First" of this answer, joins in the prayer of said bill of complaint and prays that this Court, sitting in equity, may take possession of the railroad system of the defendant and of all its property and assets through the appointment of a receiver or receivers as prayed in said bill of complaint and thereby protect and preserve the corporate franchises, privileges, property and assets and preserve the corporate existence of the defendant and protect and preserve its said system and its said

513

514 *Interborough Answer in American Brake Shoe Case.*

property, real and personal, from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and do any and all acts which may be necessary to preserve the valuable rights, contracts, franchises, property and assets of the defendant; and the defendant accordingly prays that inasmuch as there is no adequate remedy at law in the premises for the plaintiff or for this defendant, this Court will, for the purposes aforesaid, appoint a receiver or receivers as prayed for in said complaint, and empower and authorize such receiver or receivers to take possession of the entire property and assets of this defendant and to preserve, manage, operate and control the same, pay all indebted-
515 ness due or to become due by this defendant, and otherwise discharge all the duties ordinarily imposed by courts upon receivers in similar cases; that on the final hearing in this cause this Court will, under said bill of complaint and this answer, or under such supplemental bill as shall be filed herein, make such decree or decrees with respect to the property of this defendant as shall deal with the same on general equitable principles; that this Court will cause all the liens upon the property and assets of this defendant, or upon any part of said property and assets, and all rights and claims in equity of persons interested therein to be ascertained, defined and determined, and that the proceeds arising from the sale of said property and assets, or any part thereof, be applied under the orders
516 or decrees of this Court according to the rights, interests and equities of the parties interested, and that this Court will direct all persons in possession of the property and assets of this defendant, or any part thereof, to surrender the same to such receiver or receivers or to hold such property and assets as such receiver or receivers may direct.

The filing of this answer consenting to the appointment of a receiver in this cause has been duly authorized by resolution of defendant's Board of Directors.

No other action or proceeding praying for the appointment of a receiver of defendant or its property is pending in this or any other Court.

JAMES L. QUACKENBUSH,
Solicitor for Interborough Rapid
Transit Company, Defendant,
Office and Post-Office Address,
165 Broadway,
Borough of Manhattan,
City of New York, N. Y.

EXHIBIT A.

EXTRACT FROM THE MINUTES OF THE SPECIAL MEETING OF THE BOARD OF DIRECTORS OF INTERBOROUGH RAPID TRANSIT COMPANY, HELD THURSDAY, AUGUST 25, 1932, AT 4 O'CLOCK P. M.

"The Chairman stated that in view of the maturity of $31,672,100, of the 7% notes of the company on September 1, 1932, which the company would be unable to pay and which probably could not be extended under the terms of the deposit agreement with the committee headed by Mr. J. P. Morgan, or otherwise, it was to be expected that a suit for the appointment of a receiver of the company would probably be instituted in the near future and that in his opinion it would be for the best interest of the company and of its creditors, both secured and unsecured, that its property should be preserved for the benefit of all of its creditors and owners and a multiplicity of lawsuits avoided, whereupon, after full discussion,

520 *American Brake Shoe Record.*
Exhibit A to Interborough Answer.

On Motion, duly seconded, the following resolution was adopted:

RESOLVED that in case a suit be instituted against this company for the appointment of a receiver for the purpose of preserving its property for the benefit of all of its creditors, the proper officers be and they hereby are authorized and directed upon the advice of the General Counsel to interpose a duly verified answer in such suit in such form as shall be approved by the General Counsel of the company and which shall admit such allegations of the bill of complaint, as in his opinion state the true facts;
521 join in the prayer of the plaintiff and consent to the appointment of a receiver or receivers as the court may direct and James L. Quackenbush, Esq., General Counsel for the company, be and he is hereby authorized as Solicitor to file such answer and to take such action in the premises as to him shall seem appropriate."

I, H. M. FISHER, Secretary of the Interborough Rapid Transit Company, hereby certify that the foregoing is a correct copy of resolution adopted to-day.

H. M. FISHER,
Secretary.

(Corporate Seal)

522

Affidavit Showing Necessity of Individual Receivers.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

E 70-364.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JAMES L. QUACKENBUSH, being duly sworn, deposes and says: that he is a practicing attorney and a member of the Bar of the State of New York; that he is and has been the attorney and counsel for the defendant for the last twenty-five years and is thoroughly acquainted with the nature of its business.

That on account of the complexity of the questions which will arise from time to time in the course of the administration of the foregoing cause, he believes and he is informed that the parties hereto believe that it is important and in the public interest that no receiver in the cause should be a trust company or any other corporation, but that the receiver or receivers should be an individual or

individuals who could give constant and undivided attention to the matter; that the operation of the subways and elevated railroads could not be adequately managed by a trust company through its officers and employees; that while in bankruptcy the appointment of a trust company as receiver might be advisable such is not the case in respect to a railroad of the size, importance and character of the defendant with its complicated and involved daily operations, its enormous staff of operating officials and employees consisting of more than 18,000 individuals and its contracts and relations with the City of New York and the public using its facilities.

JAMES L. QUACKENBUSH.

Sworn to before me this
25th day of August, 1932.

ARTHUR G. PEACOCK,
Notary Public,
Queens County.
Certificate Filed in New York County No. 300.

(Seal)

Doc. 1
Order 1

Designation and Assignment of Hon. Martin T. Manton to Hold a District Court for the Southern District of New York.

WHEREAS, the undersigned as Senior Circuit Judge of the Second Judicial Circuit of the United States, is empowered and authorized by law, pursuant to the provisions of Title 28, Section 22 of the Code of Laws of the United States of America, if the public interest so requires, to designate and assign any Circuit Judge of the Second Judicial Circuit to hold a District Court within such Circuit; and

WHEREAS, the undersigned, as such Senior Circuit Judge, finds that the public interest requires that Martin T. Manton, a Circuit Judge of the Second Judicial Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a District Court within such Circuit, it is hereby

ORDERED, ADJUDGED AND DECREED, that the said Martin T. Manton be and he hereby is designated and assigned to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Co. vs. Interborough Rapid Transit Company, and for such further time as may be required to complete unfinished business.

Dated: New York, August 25, 1932.

MARTIN T. MANTON,
Senior Circuit Judge for the
Second Judicial Circuit.

(*Endorsed*)

U. S. District Court
Filed
August 26, 1932
S. D. of N. Y.

Doc. 2
Order 2

Order Under Section 23, Judicial Code, as to Division of Business of District Court.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND JUDICIAL CIRCUIT.

In the Matter of the Division of Business and Assignment of Cases for Trial in the Southern District of New York.	ORDER

WHEREAS, Martin T. Manton has been duly designated and assigned to hold a District Court of the United States for the Southern District of New York within this Second Judicial Circuit for a period of thirty days from this day; and

WHEREAS, Section 23 of the Judicial Code (Mar. 3, 1919, c. 231, §23, 36 Stat. 1090) provides that "In Districts having more than one District Judge, the judges may agree upon a division of business and assignment of cases

for trial in said District; but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District"; and

WHEREAS, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business and assignment of cases for trial in the Southern District of New York as provided in and pursuant to the rules of court for the Southern District of New York heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby

ORDERED, ADJUDGED AND DECREED, for a period of thirty days beginning with this day, all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the District Judge designated to hear such application pursuant to Rule 11-A of the General Rules of the District Court for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York.

Dated: New York, August 25, 1932.

MARTIN T. MANTON.

(*Endorsed*)

U. S. District Court
Filed
August 26, 1932
S. D. of N. Y.

Doc. 6
Order 3

Order Appointing Temporary Receivers.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

This cause came on to be heard at this term upon the bill of complaint and on the answer of the defendant thereto this day filed, and thereupon, upon consideration thereof, and after due deliberation, the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED, that Victor J. Dowling of the City of New York and Thomas E. Murray, Jr., of the City of New York be and they hereby are appointed temporary Receivers of the defendant, Interborough Rapid Transit Company, and of all the property and assets of the said defendant, real, personal and mixed, of whatsoever kind and description and wheresoever situated, including all railroads owned, leased or operated by said defendant, all tracks, terminal facilities, offices, shops and all buildings and appurtenances of every kind, all cars and other rolling stock and equipment, tools, machinery,

furniture, fixtures, materials and supplies, books of account, records and other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, evidences of indebtedness, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income accruing and to accrue, as well as all interest, easements, privileges and franchises and all assets of every kind, character and description of the defendant herein; that the said Receivers be, and they hereby are, authorized immediately to take possession of the same and to run, manage and operate the said railroads, properties and assets in such manner as will in their judgment produce most satisfactory results so that the operation of the railroad system of the defendant shall be continued in the same manner as at present and the public duties obligatory upon the defendant be in all respects discharged, and to exercise the authority and franchises of defendant and discharge its public duties and to preserve and protect its said system, properties and assets in proper condition and repair and to protect the title and possession and secure and develop the business of the same, and in their discretion to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing; that the said Receivers be, and they hereby are, authorized to collect and receive the rents, income, tolls and profits of the said railroads, properties and assets, and to make appropriate payments therefrom on account of accruing rents and other necessary charges, and they shall have power to redeem any and all securities of the defendant now pledged as security on loans of money, and shall have power to borrow money if needful in their judgment in order to comply with this direction, and also, so far as may be needful to meet current requirements for labor, materials and supplies, but

for no other purpose without the further order of this Court; and the said Receivers are hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in their judgment for the proper protection of the property and trust hereby reposed in them and likewise to defend all actions instituted against them as Receivers, and also to appear in and conduct the prosecution or defense of any suits now pending in any court against the defendant, the prosecution and defense of which will in the judgment of said Receivers be necessary for the proper protection of the property placed in their charge, or the interests and rights of creditors connected therewith; and the said Receivers are hereby authorized in their discretion from time to time, out of the funds coming into their hands, to pay the expenses of operating the said properties and executing their trusts, and all taxes and assessments upon the said properties or any part thereof, and all such rentals and installments as may fall or become due for the use of any portion of said railroads and other property; and also to pay and discharge all claims arising from the previous operation of said properties as in their judgment on examination are proper to be paid as expenses of operation, and also to pay the current and unpaid payrolls (especially any and all outstanding checks, drafts or orders for the payment of wages or salaries of employees of defendant for work done or services rendered prior to the date of this order), and vouchers and supply accounts incurred in the operation of said railroad system at any time within four months prior hereto. The said Receivers are hereby required to open proper books of account, wherein shall be stated the earnings, expenses, receipts and disbursements of their said trust, and preserve proper vouchers for all payments by them made on account thereof;

AND IT IS FURTHER ORDERED, that the bonds of the said Receivers in the sum of One hundred thousand dollars

each, conditioned that they will well and truly perform the duties of their office and duly account for all moneys or property which may come into their hands, and abide by and perform all things which they shall be directed to do, with sufficient sureties to be approved of by a judge of this Court, be filed in the office of the Clerk of this Court;

AND IT IS FURTHER ORDERED that the defendant, said Interborough Rapid Transit Company, and each and every of its officers, directors, agents and employees and all other persons whomsoever, be and they are hereby required and commanded forthwith, upon demand of the said Receivers, or their duly authorized agent, to turn over and deliver to said Receivers, or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his or their hands or under his or their control, and each of said directors, officers, agents and employees is hereby commanded and required to obey and perform such orders as may be given to them from time to time by the said Receivers, or their duly constituted representatives, in conducting the operation of the said system, properties and assets, and in discharging their duties as Receivers;

And the defendant, said Interborough Rapid Transit Company, and its officers, directors, agents and employees, and all other persons claiming to act by, through or under the defendant and all other persons whomsoever are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the Receivers are hereby appointed or interfering in any way to prevent the discharge of their duties or their operation of the same, and any party in interest may apply for further direction;

And it is further ordered that any applications or petitions for orders or instructions or otherwise in this cause shall be made to the undersigned in chambers or

otherwise, the undersigned hereby reserving full right and jurisdiction over this cause and any and all proceedings therein;

And it is further ordered that if either of said Receivers shall qualify by giving his bond before the other of such Receivers has so qualified, the said Receiver so first qualifying shall, until the other of such Receivers has so qualified, exercise any or all the powers, by this order or subsequent orders entered herein, conferred upon said Receivers;

And it is further ordered that if at any time either of said Receivers shall, because of absence from the United States or otherwise, be unable to act, the other of such Receivers may in such event exercise any or all the powers, by this order or subsequent orders entered herein, conferred upon said Receivers;

And it is further ordered that the parties hereto show cause before the undersigned at Room 439 at the United States Post Office Building in the City of New York on the 22nd day of September, 1932, at 10.30 o'clock in the forenoon, why the said receivership should not be continued during the pendency of this suit and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard.

Dated, New York, August 26, 1932.

MARTIN T. MANTON,
United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.

(*Endorsed*)

U. S. District Court
Filed
August 26, 1932
S. D. of N. Y.

Doc. 7.
Order 4.

Order Appointing Receivers' Counsel.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364.

This cause coming on to be heard upon the petition of Thomas E. Murray, Jr., Receiver herein, acting for and on behalf of both Receivers appointed herein, for leave to employ solicitors and general counsel for said Receivers, and upon the annexed affidavit of Thomas L. Chadbourne, and it appearing to the Court from such petition that numerous and intricate legal questions will be presented in the administration of said receivership, and that it is necessary for said Receivers to employ solicitors and general counsel to aid them in said administration, and it appearing from such petition and the affidavit of Thomas L. Chadbourne that Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, 25 Broadway, Borough of Manhattan, City of New York, are competent to act as solicitors and general counsel for said Receivers and for the special reasons set forth in such petition and affidavit are not disqualified, because of any adverse interest, it is therefore

556 *American Brake Shoe Record.*
Order Appointing Receivers' Counsel.

ORDERED that leave be, and it is hereby, granted to said Receivers to retain said Chadbourne, Stanchfield & Levy as solicitors and general counsel for the Receivers in the above-entitled cause; and it is further

ORDERED that said Chadbourne, Stanchfield & Levy be, and they are hereby, appointed the solicitors and general counsel for said Receivers.

Dated, New York, N. Y., August 26, 1932.

MANTON,
557 *U. S. Circuit Judge designated to hold a term of the District Court for Southern District of New York.*

558

Doc. 28
Order 15

Order Appointing Tort Creditors' Committee.

DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE & FOUNDRY CO., Plaintiff, against INTERBOROUGH RAPID TRANSIT CO., Defendant.	In Equity E 70-364

An order having been made in this action on August 26th, 1932, by Hon. Martin T. Manton, United States District Judge, designated to hold a session of the District Court of the United States, in and for the Southern District of New York, appointing Hon. Victor J. Dowling and Thomas E. Murray, Jr., as Receivers in Equity of the assets of the defendant herein; and it appearing to my satisfaction that it is to the best interests of the tort creditors of the defendant herein that a Committee be appointed for the purpose of protecting the interests of the tort creditors of the defendant corporation, and after due notice being given to the attorneys for the defendant herein, it is, on motion of Feltenstein & Rosenstein, attorneys for certain tort creditors,

ORDERED that the following persons be and they are hereby appointed a Protective Committee to protect and look after the interests of tort creditors of the defendant corporation, viz.:

562 *American Brake Shoe Record.*
Order Appointing Tort Creditors' Committee.

William S. Butler,
Moses Feltenstein,
Lyman A. Spalding and
Herbert C. Smyth;

and it is further

ORDERED that Mr. Moses Feltenstein be and he is hereby appointed Chairman of the aforesaid Committee, and that said Committee do appoint and select a suitable person as Secretary of such Committee; and it is further

563 ORDERED that the said Committee report to the Court from time to time as may be found necessary or as may be demanded by this Court at any such times.

MANTON, *U. S. J.*,
Designated to hold a term of the District Court for the Southern District of New York.

564

Doc. 10
Order 5

Order Granting Leave to Intervene to Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

This cause came on to be further heard at this Term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

1. That the said J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, be and they hereby are permitted to intervene as such Committee in this action as a party defendant and to appear for and represent all owners and holders of Interborough Rapid Transit Company First and Refund-

ing Mortgage 5% Gold Bonds who may deposit such Bonds with the said Committee, and

2. All notices of further motions or proceedings in the above entitled cause shall be served upon Messrs. Davis, Polk, Wardwell, Gardiner & Reed, 15 Broad Street, New York City, counsel for said Committee, pursuant to the rules and practice of this Court.

Dated, New York, September 1st, 1932.

MANTON,
United States Circuit Judge designated
569 *to hold a session of the District Court*
for the Southern District of New York.

The undersigned hereby consent to the granting of the prayer of the within petition and the entry of an order granting leave to the petitioners to intervene.

Dated, New York, N. Y., September 1, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff,
by BREED, ABBOTT & MORGAN,
Its Solicitors.

INTERBOROUGH RAPID TRANSIT COMPANY,
570 Defendant,
by JAMES L. QUACKENBUSH,
Its Solicitor.

VICTOR J. DOWLING and
THOMAS E. MURRAY, JR.,
as Temporary Receivers of Interborough Rapid Transit Company,
by CHADBOURNE, STANCHFIELD & LEVY,
Their Solicitors.

Doc. 11
Order 6

Order Granting Leave to Intervene to the Committee Constituted by and Acting under the Deposit Agreement Dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

This cause came on to be further heard at this Term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

1. That the said J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, be and they hereby are permitted to intervene as such Committee in this action as a party defendant and to appear for and represent all owners and holders of Interborough Rapid Transit Company Ten-Year

Secured Convertible 7% Gold Notes who have deposited or may deposit such notes under the said Deposit Agreement, and

2. All notices of further motions or proceedings in the above-entitled cause shall be served upon Messrs. Davis, Polk, Wardwell, Gardiner and Reed, 15 Broad Street, New York City, counsel for said Committee, pursuant to the rules and practice of this Court.

Dated, New York, September 1st, 1932.

MANTON,
United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.

The undersigned hereby consent to the granting of the prayer of the within petition and the entry of an order granting leave to the petitioners to intervene.

Dated, New York, N. Y., September 1, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff,
by BREED, ABBOTT & MORGAN,
Its Solicitors.

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant,
by JAMES L. QUACKENBUSH,
Its Solicitor.

VICTOR J. DOWLING and
THOMAS E. MURRAY, JR.,
as Temporary Receivers of Interborough Rapid Transit Company,
by CHADBOURNE, STANCHFIELD & LEVY,
Their Solicitors.

Doc. 12
Order 7

Order for Intervention of Committee for the Protection of the Holders of Ten-Year 6% Gold Notes of Interborough Rapid Transit Company Under Deposit Agreement Dated as of July 18, 1932.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK. 578

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

Upon reading and filing the annexed petition of Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, constituting a Committee for the Protection of the Holders of Ten-Year Six Per Cent. 579
Gold Notes due October 1, 1932, of the above-named defendant, and after hearing Root, Clark & Buckner, solicitors for said petitioners, and upon the subjoined consent of Chadbourne, Stanchfield & Levy, solicitors for Victor J. Dowling and Thomas E. Murray, Jr., temporary receivers of said defendant, and Breed, Abbott & Morgan, solicitors for the plaintiff, and James L. Quackenbush, solicitor for defendant, and Davis, Polk, Wardwell, Gardiner & Reed, solicitors for the Committee for Interborough Rapid

580 *American Brake Shoe Record.*
Order Permitting Interrention.

Transit Company Ten-Year Secured Convertible 7% Gold Notes due September 1, 1932, and for the Committee for Interborough Rapid Transit Company First & Refunding Mortgage 5% Gold Bonds due January 1, 1966, it is

ORDERED, that the prayer of said petitioners be, and the same hereby is, granted; and that the said Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, as a Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of this defendant, be and they hereby are
581 permitted to intervene as parties in this suit, and in any suit or proceeding presently pending or hereafter to be instituted ancillary thereto, and such intervention be, and the same hereby is, authorized and directed; and it is further

ORDERED, that all notices of further motions or proceedings in this Court and all further motions and proceedings in this suit, or in any suit or proceeding ancillary thereto, during the pendency thereof, which are required to be brought on by notice, shall be served upon the solicitors for said interveners, Root, Clark & Buckner, at their office, No. 31 Nassau Street, in the Borough of Manhattan, City of New York, pursuant to the rules and practice of this Court.

582 MANTON,
United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.

Dated, New York City, September , 1932.

American Brake Shoe Record.
Consent to Permitting Intervention.

The undersigned consent to the entry of the foregoing order.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., temporary Receivers of the above-named defendant.

BREED, ABBOTT & MORGAN,
Solicitors for the Plaintiff.

JAMES L. QUACKENBUSH,
Solicitor for Defendant.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for the Committee for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes due September 1, 1932, and for the Committee for Interborough Rapid Transit Company First & Refunding Mortgage 5% Gold Bonds due January 1, 1966.

Doc. 14
Order 8

Order Dated September 6, 1932, Appointing Temporary Receiver for Manhattan Railway Company.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

587 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity
E 70-364

IN THE MATTER
OF
The Petition of MANHATTAN RAILWAY COMPANY.

588 This cause came on to be heard at this term upon the petition of Manhattan Railway Company this day filed, to be made a party defendant in this suit and for other relief, and thereupon, upon consideration thereof, and after hearing Dills, Muecke & Schelker, solicitors for said petitioners, Breed, Abbott & Morgan for plaintiff, James L. Quackenbush for defendant, Chadbourne, Stanchfield & Levy for the Receivers herein, Davies, Auerbach & Cornell for Central Hanover Bank and Trust Company, Trustee under the Consolidated Mortgage of Manhattan Railway Chase National Bank of the City of New York, Trustee Company, and Milbank, Tweed, Hope & Webb for the

under the Second Mortgage of Manhattan Railway Company, Davis, Polk, Wardwell, Gardiner & Reed for Messrs. J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell as a Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds and as a Committee for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, and Root, Clark & Buckner for Messrs. Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood as a Committee for Interborough Rapid Transit Company Ten-Year Six Per Cent. Gold Notes, and after due deliberation, the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED that the petitioner, Manhattan Railway Company, be and it is hereby made a party defendant in this cause;

AND IT IS FURTHER ORDERED, that the receivership in this cause be and the same is hereby extended to said petitioner, Manhattan Railway Company, and its property and assets, real, personal and mixed, of whatsoever kind and description and wheresoever situated, as prayed in said petition;

AND IT IS FURTHER ORDERED, that William Roberts, of the City of New York, be and he is hereby appointed temporary Receiver of the defendant Manhattan Railway Company and its property and assets, real, personal and mixed, of whatsoever kind and description and wheresoever situated, and, as such temporary Receiver, shall have and exercise in respect of said properties and assets of Manhattan Railway Company (subject to all the rights of the defendant Interborough Rapid Transit Company and its Receivers under all leases and agreements between Inter-

borough Rapid Transit Company and Manhattan Railway Company), the like rights, powers and duties with respect thereto that Victor J. Dowling and Thomas E. Murray, Jr., were heretofore given by order of this Court dated August 26, 1932, with respect to the Interborough Rapid Transit Company and the properties and assets of Interborough Rapid Transit Company; but nothing in this order contained shall be deemed in any way to prejudice, affect, impair, diminish, enlarge or augment the rights of Manhattan Railway Company or its said Receiver against Interborough Rapid Transit Company or its said Re-
593 ceivers, or in any way to prejudice, affect, impair, diminish, enlarge or augment the rights of Interborough Rapid Transit Company or its said Receivers against Manhattan Railway Company or its said Receiver, or to constitute an affirmance or disaffirmance of, or affect the right, if any, to affirm or disaffirm, any lease, leases, agreement or agreements between Manhattan Railway Company and Interborough Rapid Transit Company, or to put the said Receiver of Manhattan Railway Company into physical possession of any properties now properly in the possession of the said Receivers of Interborough Rapid Transit Company under the order appointing them; all rights of said Receivers for Interborough Rapid Transit Company and of said Receiver for Manhattan Railway Company, each
594 against the other, being fully reserved and being entirely maintained, without prejudice, in *statu quo ante* and completely undisturbed by the entry of this order;

AND IT IS FURTHER ORDERED, that the bond of the said Receiver of the defendant Manhattan Railway Company in the sum of One hundred thousand dollars, conditioned that he will well and truly perform the duties of his office and duly account for all moneys or property which may come into his hands, and abide by and perform all things which he shall be directed to do, with sufficient sureties to be approved of by a judge of this Court, be filed in the office of the Clerk of this Court;

American Brake Shoe Record.
Order Appointing Temporary Receiver for Manhattan Railway Company.

AND IT IS FURTHER ORDERED, that the defendant, said Manhattan Railway Company, and each and every of its officers, directors, agents and employees and all other persons whomsoever, be and they are hereby required and commanded forthwith, upon demand of the said Receiver, or his duly authorized agent, to turn over and deliver to said Receiver, or his duly constituted representatives, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his or their hands or under his or their control, and each of said directors, officers, agents and employees is hereby commanded and required to obey and perform such orders as may be given to them from time to time by the said Receiver, or his duly constituted representatives, in conducting the operation of the said properties and assets, and in discharging his duties as Receiver;

And the defendant, said Manhattan Railway Company, and its officers, directors, agents and employees, and all other persons claiming to act by, through or under the defendant and all other persons whomsoever, are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the Receiver is hereby appointed or interfering in any way to prevent the discharge of his duties or his operation of the same, and any party in interest may apply for further direction;

And the said temporary Receivers of Interborough Rapid Transit Company are hereby directed to keep separate accounts with respect to the properties of Manhattan Railway Company so that the rents, issues and profits from such properties may be segregated;

AND IT IS FURTHER ORDERED, that the parties hereto show cause before the undersigned at Room 439 at the United

598 *American Brake Shoe Record.*
Order Appointing Temporary Receiver for Manhattan Railway Company.

States Post Office Building in the City of New York on the 22nd day of September, 1932, at 10.30 o'clock in the forenoon, why the extension of said receivership to said Manhattan Railway Company and its said property and assets should not be continued during the pendency of this suit and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard.

Dated, September 6th, 1932.

MARTIN T. MANTON,
599 *United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York*

600

Doc. 20
Order 9

Order Granting Leave to Intervene to Committee for Manhattan Railway Company Consolidated Mortgage Gold Four Per Cent. Bonds.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED as follows:

(1) That the said Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, be and they hereby are permitted to intervene as such Protective Committee in this action as a party defendant and to appear for and represent all owners and holders of Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, who may deposit such Bonds with said Protective Committee; and

604 *American Brake Shoe Record.*
Order Permitting Manhattan Ry. Co. Bondholders' Committee to Intervene.

(2) That all notices of further motions or proceedings in the above-entitled cause shall be served upon Messrs. Cotton, Franklin, Wright & Gordon, No. 63 Wall Street, New York City, counsel for said Protective Committee, pursuant to the rules and practice of this Court.

Dated, New York, N. Y., September 6th, 1932.

(sgd.) MANTON,
United States District Judge designated to hold session of the District Court
605 *for the Southern District of New York.*

The undersigned hereby consent to the granting of the prayer of the within petition and the entry of an order granting leave to the petitioners to intervene.

Dated, New York, N. Y., September 7, 1932.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., Temporary Receivers of Interborough Rapid Transit Company.

606

BREED, ABBOTT & MORGAN,
Solicitors for Plaintiff, American Brake Shoe and Foundry Company.

JAMES L. QUACKENBUSH,
Solicitor for Defendant, Interborough Rapid Transit Co.

Doc. 26
Order 14

Order Appointing Counsel for Receiver of Manhattan Railway Company.

At a Stated Term of the United States District Court for the Southern District of New York, held in and for the said District, at the Old Post Office Building, in the Borough of Manhattan, City, County and State of New York, on the 7th day of September, 1932.

Present:
Hon. MARTIN T. MANTON,
Circuit Judge.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364
IN THE MATTER OF THE PETITION OF MANHATTAN RAILWAY COMPANY.	

This cause having come on to be heard upon the petition of William Roberts, Receiver of Manhattan Railway Company herein, for leave to employ counsel for said Receiver, and it appearing to the Court that there are numerous legal questions presented in the administration of said receivership, and that it is necessary for said Receiver

to employ counsel to aid him in said administration, and that Messrs. Hughes, Schurman & Dwight, of 100 Broadway, Borough of Manhattan, City of New York, are familiar with the matters appertaining to said receivership, and are competent to act as attorneys for said Receiver, it is therefore

ORDERED that leave be and it hereby is granted to said William Roberts, as Receiver of Manhattan Railway Company, to retain and employ Messrs. Hughes, Schurman & Dwight as attorneys for the Receiver of Manhattan Railway Company in the above entitled cause. And it is

FURTHER ORDERED that Messrs. Hughes, Schurman & Dwight be and they hereby are appointed attorneys for said William Roberts, Receiver of Manhattan Railway Company in the above entitled cause.

Enter,

MARTIN T. MANTON,
United States Circuit Judge designated to hold a term of the District Court of the Southern District of New York.

Doc. 29
Order 16

Amendment of Order Appointing Tort Creditors' Committee to Include Tort Claimants.

DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE & FOUNDRY CO., Plaintiff, against INTERBOROUGH RAPID TRANSIT CO., Defendant.	In Equity E 70-364

An order having been made in the above entitled action appointing William S. Butler, Moses Feltenstein, Lyman A. Spalding and Herbert C. Smyth as a Protective Committee to protect and look after the interests of tort creditors of the defendant corporation, such order having been made on or about the 29th day of August, 1932, by Hon. Martin T. Manton, United States Judge, designated to hold a term of the District Court for the Southern District of New York, it is, on motion of Feltenstein & Rosenstein, attorneys for certain tort creditors and claimants,

ORDERED that the aforementioned order be and the same is hereby amended nunc pro tunc as of August 29th, 1932, to read as follows:

616 *American Brake Shoe Record.*
Amendment of Order Appointing Tort Creditors' Committee.

DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE & FOUNDRY CO., Plaintiff, against INTERBOROUGH RAPID TRANSIT CO., Defendant	In Equity E 70-364

617

An order having been made in this action on August 26th, 1932, by Hon. Martin T. Manton, United States District Judge, designated to hold a session of the District Court of the United States, in and for the Southern District of New York, appointing Hon. Victor J. Dowling and Thomas E. Murray, Jr., as Receivers in Equity of the assets of the defendant herein; and it appearing to my satisfaction that it is to the best interests of the tort creditors and tort claimants of the defendant herein that a Committee be appointed for the purpose of protecting the interests of the tort creditors and tort claimants of the defendant corporation, and after due notice being given
618 to the attorneys for the defendant herein, it is, on motion of Feltenstein & Rosenstein, attorneys for certain tort creditors and tort claimants,

ORDERED that the following persons be and they are hereby appointed a Protective Committee to protect and look after the interests of tort creditors and tort claimants of the defendant corporation, viz.:

William S. Butler,
Moses Feltenstein,
Lyman A. Spalding and
Herbert C. Smyth;

and it is further

ORDERED that Mr. Moses Feltenstein be and he is hereby appointed Chairman of the aforesaid Committee, and that said Committee do appoint and select a suitable person as Secretary of such Committee; and it is further

ORDERED that the said Committee report to the Court from time to time as may be found necessary or as may be demanded by this Court at any such times.

MANTON,
U. S. C. J.

Sept. 9/32

Doc. 22
Order 10

Order Authorizing Receivers to Number Documents and Papers.

IN THE

UNITED STATES DISTRICT COURT

623 FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., the Receivers herein of Interborough Rapid Transit Company,
621 and upon the consent thereto of the attorneys for the complainant, the attorney for the defendant, the attorneys for the Committee constituted by and acting under the deposit agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes, the attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, the attorneys for the Committee for the protection of the holders of Ten-Year

6% Gold Notes due October 1, 1932, of Interborough Rapid Transit Company, the attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, and the attorneys for the Receiver of Manhattan Railway Company, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED that the Receivers be and they hereby are authorized and permitted to cause all of the documents and papers to be filed in the proceedings in this cause to be numbered, and that any parties in these proceedings may refer by such number to any of such documents and papers in any subsequent proceedings in this cause.

Dated, New York, N. Y., September 12th, 1932.

MANTON,
U. S. Circuit Judge designated to hold a term of the District Court for the Southern District of New York.

Doc. 23
Order 11

Order Authorizing Receivers to Maintain a Printed Record of All Documents.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., the Receivers herein of Interborough Rapid Transit Company, and upon the consent thereto of the attorneys for the complainant, the attorney for the defendant, the attorneys for the Committee constituted by and acting under the deposit agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes, the attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, the attorneys for the Committee for the protection of the holders of Ten-Year 6% Gold Notes due October 1, 1932, of Interborough Rapid Transit Company, the attorneys for the Protective Committee for Manhattan Railway Company Consolidated

Mortgage Gold 4% Bonds and the attorneys for the Receiver of Manhattan Railway Company, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, and it appearing to the Court that the entry of this order will facilitate and further the orderly and careful administration of the estate, it is therefore

ORDERED, ADJUDGED AND DECREED that leave be and it is hereby granted to said Receivers to maintain a printed record of all documents arising in the proceedings in this cause and of any further documents and papers which in the discretion of the Receivers should be so printed.

Dated, New York, N. Y., September 12th, 1932.

MANTON,
U. S. Circuit Judge designated to hold a term of the District Court for the Southern District of New York.

Doc. 24
Order 12

Order Authorizing Receivers to Pay Expenses for Registration and Transfer of Stock of Interborough Rapid Transit Company.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

629

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., the Receivers herein of Interborough Rapid Transit Company, and upon the consent thereto of the attorneys for the
630 complainant, the attorney for the defendant, the attorneys for the Committee constituted by and acting under the deposit agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes, the attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, the attorneys for the Committee for the protection of the holders of Ten-Year 6% Gold Notes due October 1, 1932, of Interborough Rapid Transit Company, the attorneys for the Protective

Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds and the attorneys for the Receiver of Manhattan Railway Company, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, and it appearing to the Court that the entry of this order will facilitate and further the orderly and careful administration of the estate, it is therefore

ORDERED, ADJUDGED AND DECREED that, until the Court shall otherwise direct, the Receivers be and they hereby are authorized to pay, out of funds coming into their hands as Receivers, such expenses as they shall deem necessary or proper for the registration and transfer of the outstanding shares of stock of Interborough Rapid Transit Company.

Dated, New York, N. Y., September 12th, 1932.

MANTON,
U. S. Circuit Judge designated to hold a term of the District Court for the Southern District of New York.

Doc. 25
Order 13

Order Deferring Payment of State Franchise Tax.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

635

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity
E 70-364

This cause coming on to be heard on the petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers herein for Interborough Rapid Transit Company, praying
636 for an order with respect to the non-payment of the franchise tax for said Company, and upon the consents of the solicitors for the Complainant, the solicitor for the Defendant, the solicitors for the Committee constituted and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes, the solicitors for the Committee for Interborough Rapid Transit Company's First and Refunding Mortgage 5% Gold Bonds, and the solicitors for the Committee for the protection of the

holders of Ten-Year 6% Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company, and after hearing the arguments of the solicitors for the said Receivers, and the solicitors for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, and the solicitors for the Receiver of Manhattan Railway Company, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, it is therefore

ORDERED, ADJUDGED AND DECREED that said Receivers be and they hereby are authorized and directed not to pay the franchise tax referred to in the said petition of said Receivers until such time as this Court shall otherwise direct.

Dated, New York, N. Y., September 14, 1932.

MANTON,
United States Circuit Judge designated to hold a term of the District Court for the Southern District of New York.

Doc. 30
Order 18

Order Granting Leave to Central Hanover Bank and Trust Company to Intervene.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. 70-364

ORDER GRANTING PETITION OF CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE UNDER CONSOLIDATED MORTGAGE OF MANHATTAN RAILWAY COMPANY, FOR LEAVE TO INTERVENE AND BE MADE A PARTY.

This cause came on to be further heard at this term upon the petition of Central Hanover Bank and Trust Company, as Trustee, this day filed, for permission to intervene herein and to be made a party hereto, and was argued by counsel; and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED that the petitioner, Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Com-

pany, be and it hereby is permitted to intervene herein and it is hereby made a party in this cause.

Dated, September 19th, 1932.

MANTON,
United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.

Doc. 30a

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. 70-364

Upon the petition filed herewith of Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company, for leave to intervene and be made a party herein,

LET the plaintiff, the defendant Interborough Rapid Transit Company, the defendant Manhattan Railway

616 Company, the Receivers heretofore appointed herein of the property of Interborough Rapid Transit Company and the Receiver heretofore appointed herein of the property of Manhattan Railway Company, show cause before this Court at Room 439 of the Old Post Office Building, Broadway and Park Row, New York City, on the 19th day of September, 1932, at 2 P. M. o'clock or as soon thereafter as counsel may be heard, why an order should not be made and entered granting to said petitioner leave to intervene and be made a party herein; and it is further

617 ORDERED that service of a copy of this order and of the petition annexed hereto upon said parties or their attorneys on or before the 17th day of September, 1932, at 1 o'clock in the afternoon of that day, shall be deemed a good and sufficient service.

Dated, New York, September 16th, 1932.

MANTON,
United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.

618

Doc. 35
Order 17

Order Authorizing Receivers to Employ Court Reporters.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK. 650

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., the Receivers herein of Interborough Rapid Transit Company, 651
and upon the consent thereto of the attorneys for the complainant, the attorney for the defendant, the attorneys for the Committee constituted by and acting under the deposit agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes, the attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, the attorneys for the Committee for the protection of the holders of Ten-Year

652 *American Brake Shoe Record.*
Order to Employ Court Reporters.

6% Gold Notes due October 1, 1932, of Interborough Rapid Transit Company, the attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, and the attorneys for the Receiver of Manhattan Railway Company and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED that the Receivers be and they are hereby authorized and directed to employ Southern District Court Reporters, 15 Park Row, New York City, N. Y., as court reporters to report testimony
653 and arguments before this Court in these proceedings.

Dated, New York, N. Y., September 26, 1932.

MANTON,
U. S. Circuit Judge designated to hold a term of the District Court for the Southern District of New York.

654

Doc. 49
Order 23

Order Granting Leave to Central Hanover Bank and Trust Company, as Trustee, to Make Receivers Parties Defendant to Bill of Complaint.

IN THE

UNITED STATES DISTRICT COURT

650

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was 657

ORDERED, ADJUDGED AND DECREED, that leave be and the same hereby is granted to Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of the Manhattan Railway Company, to make Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of the property of Interborough Rapid Transit Company, and

658 *American Brake Shoe Record.*
Order to Make Receivers Parties Defendant.

William Roberts, as Receiver of the property of Manhattan Railway Company, parties defendant to any bill of complaint which it may file in this Court for the protection and/or enforcement of any rights of said Trustee and the holders of the bonds and coupons secured by said Consolidated Mortgage with respect to any property in the possession of said Receivers or any of them.

Dated, September 27, 1932.

MANTON,
United States Circuit Judge designated
659 *to hold a session of the District Court*
for the Southern District of New York.

660

Doc. 48
Order 22

Order Granting Leave to Intervene to Harold Palmer and Others as Protective Committee for 7% Stock of Manhattan Railway Company.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364 ORDER

This cause coming on to be heard upon the petition for intervention by Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee for holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company, and upon motion pursuant thereto, and the Court being duly advised, it is

ORDERED that said Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee for Manhattan Railway Company Seven Per Cent. Guaranteed Stock, be and they hereby are permitted to intervene as such Protective Committee in this cause as a party defendant, and to appear for and represent owners and holders of such stock who may make deposits with said Committee; and that

664 *American Brake Shoe Record.*
Order for Palmer & Ors. to Intervene.

notices of further proceedings in this cause shall be served upon Messrs. Marshall & Wehle, No. 50 Broadway, New York City, solicitors for said Committee.

Dated, New York, N. Y., September 28, 1932.

(Signed) MANTON,
U. S. C. J.

(*Endorsement on Cover*)

U. S. District Court
Filed
665 Sept. 29, 1932
S. D. of N. Y.

666

Doc. 46
Order 21

Order Continuing Receivership.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

This cause came on to be heard at this term and thereupon, upon consideration thereof,

IT WAS ORDERED, ADJUDGED AND DECREED as follows:

1. The receivership of the defendant Interborough Rapid Transit Company and of all its property and assets, and the extension of such receivership to defendant Manhattan Railway Company and of all its property and assets, are hereby continued during the pendency of this cause; Victor J. Dowling and Thomas E. Murray, Jr., are hereby continued as Receivers of the defendant Interborough Rapid Transit Company and of all its property and assets during the pendency of this cause, with all the powers heretofore granted said Receivers by the order of this Court entered herein August 26, 1932, appointing them Receivers of Interborough Rapid Transit Company

670 *American Brake Shoe Record.*
Order Continuing Receivership.

and by any other orders heretofore entered herein; and William Roberts is hereby continued as Receiver of the defendant Manhattan Railway Company and of all its property and assets during the pendency of this cause, with all the powers heretofore granted said Receiver by the order of this Court entered herein September 6, 1932, appointing him Receiver of Manhattan Railway Company and by any other orders heretofore entered herein.

2. All other terms and provisions of said order entered herein August 26, 1932, and of said order of September 6, 1932, and all other orders entered herein are continued
671 during the pendency of this cause, until the further order of this Court.

3. The bonds of the said Receivers, Victor J. Dowling and Thomas E. Murray, Jr., in the sum of $100,000 each heretofore given by each of said Receivers in accordance with said order of this Court entered herein August 26, 1932, shall stand, and said bonds are hereby approved and shall be and be deemed to be the bonds of such Receivers acting pursuant to this order, and said Receivers are hereby authorized to pay the premiums on said bonds out of the receivership estate of Interborough Rapid Transit Company.

672 4. The bond of the said Receiver, William Roberts, in the sum of $100,000 heretofore given by said Receiver in accordance with said order of this Court entered herein September 6, 1932, shall stand, and said bond is hereby approved and shall be and be deemed to be the bond of said Receiver acting pursuant to this order, and said Receiver is hereby authorized to pay the premium on said bond out of the receivership estate of Manhattan Railway Company.

5. Any application or petition for orders or instructions or otherwise in this cause shall be made to the

undersigned in chambers or otherwise, the undersigned hereby reserving full right and jurisdiction over this cause and any and all proceedings therein.

6. The September, 1932, equity term of this Court is extended until after the complete execution and carrying out of this order and decree, and until after the final determination and disposition of all matters herein reserved for future determination or action by this Court. Said equity term is extended, in any event, for a period of three years from the date of this order or decree, with leave to any party to the above-entitled cause at any time prior to the expiration of said period of three years to apply to this Court for a further extension of said term, this Court reserving full jurisdiction over the parties to the above-entitled cause and over the property and assets of the defendant Interborough Rapid Transit Company and of the defendant Manhattan Elevated Railway Company, and reserves for later adjudication or other action any and all matters which in due course may come before this Court for determination, and for that purpose the term of the Court is hereby extended.

Dated, New York, September 28th, 1932.

MARTIN T. MANTON,
United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.

(*Endorsed*)

U. S. District Court
Filed
Sept. 29, 1932
S. D. of N. Y.

Doc. 34a
Order 19

Order Making Guaranty Trust Company of New York, Trustee, a Party and Directing Hearing on Receivers' Application as to Payments Under Manhattan Lease.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

677 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff,

against

INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.

In Equity
E 70-364

On reading and filing the petition of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of Interborough Rapid Transit Company, filed this day, praying for instructions of this Court in respect to the railroads of Manhattan Railway Company and other matters therein set forth, it is

678 ORDERED, that Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company dated March 20, 1913, be and is hereby made a party to this cause; and it is

FURTHER ORDERED, that a copy of said petition and this order be served upon all the parties to this cause, including Guaranty Trust Company of New York as Trustee as aforesaid and the Receiver of Manhattan Railway Com-

pany, and that said service be made on or before the 29th day of September, 1932, and that all of said parties be and they are hereby directed to serve and file their respective answers to said petition on or before the 1st day of October, 1932, and that said petition be and is hereby set down for hearing on the 3rd day of October, 1932, at 3 o'clock P. M., in Room 439, United States Post Office Building, Borough of Manhattan, City of New York, or at such other time as the Court may hereafter fix; and it is

FURTHER ORDERED, that pending said hearing and the final order of this Court upon said petition, said Victor 68
J. Dowling and Thomas E. Murray, Jr., as Receivers for Interborough Rapid Transit Company, be and they are hereby directed to refrain from making any payments of taxes payable by or with respect to the properties or franchises of Manhattan Railway Company, or with respect to the Federal income taxes payable by said company, or of the semi-annual interest instalment payable October 1, 1932, upon the Consolidated Mortgage Bonds of said Manhattan Railway Company, or the quarterly rental payable on said date upon the 43,510 shares of stock of said Manhattan Railway Company not participating in the Readjustment Plan of 1922 or the semi-annual payment of $25,000 for administration expenses of Manhattan Railway Company, and that pending said hearing and final order 68
no action done or taken by said Receivers of Interborough Rapid Transit Company shall be deemed to constitute either an adoption or rejection of the lease and other agreements mentioned in said petition.

Dated: New York, Sept. 28, 1932.

MANTON,
United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.

682 *American Brake Shoe Record.*

Doc. 36a
Order 20

Order Respecting Sinking Fund Moneys.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,

683 against

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity
E 70-364

This cause came on to be heard at this term upon the application of Victor J. Dowling and Thomas E. Murray, Jr., the Receivers herein, praying for instructions with respect to sinking fund moneys held by Guaranty Trust Company of New York as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913, and was argued by counsel, and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED that said Receivers be
684 and they hereby are instructed and directed to take no action to secure the return to them of any sinking fund moneys now held by Guaranty Trust Company of New York, as Trustee under said First and Refunding Mortgage.

Dated, New York, N. Y., October 3, 1932.

MANTON,
United States Circuit Judge designated to hold a term of the District Court for the Southern District of New York.

Doc. 66a
Order 24

Order Terminating Appointment and Employment of Chadbourne, Stanchfield & Levy as Solicitors and General Counsel for Interborough Receivers.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY *et al.*, Defendants.	In Equity E 70-364

The petition of Messrs. Chadbourne, Stanchfield & Levy, heretofore appointed as solicitors and general counsel for the receivers of the Interborough Rapid Transit Company, stating their determination to discontinue their said employment came on to be heard at this term and thereupon it was ordered,

That the determination of Chadbourne, Stanchfield & Levy to discontinue their employment as solicitors and general counsel for the receivers herein be and is hereby accepted and that the appointment and employment of Chadbourne, Stanchfield & Levy as solicitors and general counsel for said receivers be and the same is hereby terminated.

Dated, New York, N. Y., October 11, 1932.

MARTIN T. MANTON,
United States Circuit Court Judge designated to hold a term of the District Court for the Southern District of New York.

Doc. 66b
Order No. 25

Order Appointing Hornblower, Miller, Miller & Boston as Solicitors and General Counsel for the Interborough Receivers.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

689

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY *et al.*, Defendants.	In Equity E 70-364

This cause coming on further to be heard at this term and it appearing to the court that it is necessary for Victor J. Dowling and Thomas E. Murray, Jr., receivers herein,
690 to employ solicitors and general counsel to aid them in the administration of their receivership in lieu and in place of Chadbourne, Stanchfield & Levy, and after reading the affidavit of Nathan L. Miller, verified October 11, 1932, and it appearing from the said affidavit that Hornblower, Miller, Miller and Boston, practicing attorneys and members of the bar of the State of New York with an office at 15 Broad Street, Borough of Manhattan, City,

County and State of New York, are competent to act as solicitors and general counsel for said receivers and are not disqualified because of any adverse interest, the undersigned judge, upon his own motion, hereby

SELECTS and APPOINTS the firm of Hornblower, Miller, Miller & Boston, to be solicitors and general counsel for the said receivers.

Dated, New York City, October 11, 1932.

MARTIN T. MANTON,
U. S. Circuit Judge designated to hold a term of the District Court of the United States for the Southern District of New York.

Doc. 8.

Receivers' Application No. 1.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E70-364.

The petition of Thomas E. Murray, Jr., Receiver herein, acting on behalf of and for both Receivers, duly appointed by an order of this Court, dated August 26, 1932, upon

information and belief, respectfully shows to this Court as follows:

1. On August 26, 1932, by an order of this Court, your petitioner and Victor J. Dowling were duly appointed Receivers herein, and your petitioner has duly executed and filed the bond required by the terms of said order, and is now acting as such Receiver.

2. Your petitioner realizes that the duties of the Receivers are complicated, and that there are many intricate legal questions which will arise in the conduct of such
695 duties, and it is therefore imperative that your Receivers be allowed to employ solicitors and general counsel to represent them and advise them in their discharge of such duties, in order that they may properly administer their trust.

3. Your petitioner deems the firm of Chadbourne, Stanchfield & Levy, practicing attorneys and members of the bar of the State of New York, at No. 25 Broadway, Borough of Manhattan, City of New York, to be competent and qualified to represent them as their solicitors and general counsel in the administration of said trust for the following reasons:

Several members of the firm of Chadbourne, Stanchfield & Levy have had previous contact with the legal prob-
696 lems pertaining to traction matters both in New York City and Chicago, Illinois.

Furthermore, said firm has an extensive practice of equity receivership matters.

4. Your petitioner has been requested by the firm of Root, Clark & Buckner, counsel for the Committee for the Ten-Year Six Per Cent. Gold Notes of Interborough Rapid Transit Company, to retain said firm of Chadbourne, Stanchfield & Levy as the solicitors and general counsel for the Receivers in this cause, and your petitioner is of the belief that, because of the reasons above set forth, it is advisable to accept such suggestion.

WHEREFORE, your petitioner prays that an order be entered herein granting leave to your Receivers to employ said firm of Chadbourne, Stanchfield & Levy to be solicitors and general counsel for them as such Receivers in this cause.

Dated, New York, N. Y., August 26, 1932.

THOMAS E. MURRAY, JR.,
Receiver, Acting on Behalf of
and for Both the Receivers.

Doc. 8.

Affidavit by Receivers' Counsel.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
701
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

THOMAS L. CHADBOURNE, being duly sworn, deposes and says:

1. That he is one of the partners of the firm of Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, of 25 Broadway, Borough of Manhattan, City of New York.
702

2. That several members of the firm of Chadbourne, Stanchfield & Levy have had contact with the intricate and numerous legal problems in connection with traction matters, both in the City of New York and in the City of Chicago, Illinois. Furthermore, the firm of Chadbourne, Stanchfield & Levy has an extensive practice in connection with equity receivership causes.

3. That such firm was appointed counsel for the Committee for the Ten-Year Six Per Cent. Gold Notes of Inter-

borough Rapid Transit Company on or about July 18, 1932, but such firm has, prior to the institution of this cause, resigned as counsel for such Committee. Such firm has acted on some occasions as attorneys for the firm of Hayden, Stone & Co. and for some members of Hayden, Stone & Co. Your deponent believes that the firm of Hayden, Stone & Co. and possibly some members of such firm may be interested in securities of Interborough Rapid Transit Company. However, the firm of Chadbourne, Stanchfield & Levy does not and will not represent any creditor of Interborough Rapid Transit Company or any other person interested in the above cause or in the receivership estate.

4. Such firm of Chadbourne, Stanchfield & Levy has not at any time been counsel for Interborough Rapid Transit Company. Said firm neither have nor represent nor does any member or associate of said firm have or represent any interest adverse to Interborough Rapid Transit Company or the Receivers of Interborough Rapid Transit Company appointed by order of this Court entered August 26, 1932.

THOMAS L. CHADBOURNE.

Sworn to before me this
26 day of August, 1932.

ARTHUR G. PEACOCK,
Notary Public,
Queens County.
Certificate filed in New York County No. 300.

Doc. 9.

Consent and Waiver of Notice as to Appointment of Receivers' Counsel.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

707 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

We hereby waive notice of the within petition and consent to the granting and entering of the attached order authorizing the Receivers herein to employ as their solicitors and general counsel herein the firm of Chadbourne, Stanchfield & Levy.

708 Dated, New York, N. Y., August 26, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.

Doc. 10

Petition for Order Granting Leave to Intervene to Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

To the Judges of the District Court of the United States for the Southern District of New York:

The petition of J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee acting for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966, on behalf of themselves and on behalf of all other owners of such Bonds (hereinafter called the "Bonds"), who may deposit their Bonds with the Committee, respectfully shows as follows:

712 *American Brake Shoe Record.*
Petition for Leave to Intervene.

(1) Since 1919, the Committee, with minor changes in personnel, has acted for the Bonds. On August 31, 1932, the Committee by published notice called for the deposit of Bonds with its designated Depositary.

(2) The members of the Committee represent a substantial amount of the Bonds.

(3) That on or about August 25, 1932, The American Brake Shoe and Foundry Company, the plaintiff herein, filed in this Court its Bill of Complaint against the Interborough Rapid Transit Company as a general creditor, and thereupon and on or about August 26, 1932, Victor
713 J. Dowling and Thomas E. Murray, Jr., of the City of New York, were duly appointed temporary receivers of the defendant Interborough Rapid Transit Company and its property in said suit.

(4) Your petitioners are informed and believe that numerous questions of vital and far-reaching importance in so far as they affect the interests of the Bonds represented by the Committee will be raised in the above-entitled cause and come before this Court for its decision thereon. Your petitioners refer to the Bill of Complaint herein of The American Brake Shoe and Foundry Company, plaintiff, wherein the facts with regard to certain of these matters are set forth at length.

714 (5) Your petitioners, as such Committee, allege that in view of the importance to the Bonds which they represent of the questions which will arise from time to time in this cause, they should be permitted to intervene in this cause.

WHEREFORE, your petitioners pray that an order be entered herein permitting your petitioners, as the Committee acting for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds, to intervene as a

party defendant in this cause with the right to plead on behalf of the holders of the Bonds and to be heard on all matters arising in this cause, and that your petitioners be entitled to notice of all proceedings herein and that your petitioners have such other and further relief as to this Court may seem just and proper.

Dated, New York, N. Y., August 31, 1932.

J. P. MORGAN,
ARTHUR M. ANDERSON,
FREDERIC W. ALLEN,
GEORGE F. BAKER,
EDWARD D. DUFFIELD,
F. H. ECKER,
HALSTEAD G. FREEMAN,
DARWIN P. KINGSLEY,
G. HERMANN KINNICUTT,
H. C. MCELDOWNEY, and
CHARLES E. MITCHELL,
as the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds,
by ARTHUR M. ANDERSON,
Vice-Chairman.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for Petitioners.

EDWIN S. S. SUNDERLAND, of Counsel.

Doc. 11

Petition for Order Granting Leave to Intervene to the Committee Constituted by and Acting under the Deposit Agreement Dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

719

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

To the Judges of the District Court of the United States for the Southern District of New York:

720 The petition of J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes (hereinafter called the "Deposit Agreement"), on behalf of themselves and on behalf of all other owners of Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes (here-

inafter called the "Notes"), who may elect to become parties to the Deposit Agreement, respectfully shows as follows:

(1) Since the recent call for deposits under the Deposit Agreement of July 19, 1932, there have been deposited with the Depositary under the Deposit Agreement a substantial amount out of the principal amount of $31,672,100 of the Notes.

(2) That on or about August 25, 1932, the American Brake Shoe and Foundry Company, the plaintiff herein, filed in this Court its Bill of Complaint against the Interborough Rapid Transit Company as a general creditor, and thereupon and on or about August 26, 1932, Victor J. Dowling and Thomas E. Murray, Jr., of the City of New York, were duly appointed temporary receivers of the defendant Interborough Rapid Transit Company and its property in said suit.

(3) Your petitioners are informed and believe that numerous questions of vital and far-reaching importance in so far as they affect the interests of the Notes represented by the Committee will be raised in the above-entitled cause and come before this Court for its decision thereon. Your petitioners refer to the Bill of Complaint herein of The American Brake Shoe and Foundry Company, plaintiff, wherein the facts with regard to certain of these matters are set forth at length.

(4) Your petitioners, as such Committee, allege that in view of the importance to the Notes which they represent of the questions which will arise from time to time in this cause, they should be permitted to intervene in this cause for the purpose of protecting the rights and interests of the holders of Notes represented by them.

724 WHEREFORE, Your petitioners pray that an order be entered herein permitting your petitioners, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, to intervene as a party defendant in this cause with the right to plead on behalf of the holders of the Notes and to be heard in all matters arising in this cause, and that your petitioners be entitled to notice of all proceedings herein and that your petitioners have such other and further relief as to this Court may seem just and proper.

725 Dated, New York, N. Y., August 31, 1932.

J. P. MORGAN,
ARTHUR M. ANDERSON,
FREDERIC W. ALLEN,
GEORGE F. BAKER,
EDWARD D. DUFFIELD,
F. H. ECKER,
HALSTEAD G. FREEMAN,
DARWIN P. KINGSLEY,
G. HERMANN KINNICUTT,
H. C. MCELDOWNEY, and
CHARLES E. MITCHELL,
as the Committee constituted by and acting
726 under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes,
By ARTHUR M. ANDERSON,
Vice-Chairman.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for Petitioners.

EDWIN S. S. SUNDERLAND, of Counsel.

Doc. 12

Petition for Order for Intervention of Committee for the Protection of the Holders of Ten-Year 6% Gold Notes of Interborough Rapid Transit Company under Deposit Agreement Dated as of July 18, 1932.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The petition of Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, constituting a Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of the above-named defendant, by their solicitors, Root, Clark & Buckner, respectfully shows to this Court and alleges:

1. The above-entitled suit was commenced on or about August 25, 1932, by the above-named plaintiff, a creditor of the above-named defendant, by the filing in this Court of a creditor's bill in equity against said defendant. On or about said day said defendant appeared in said suit and by its answer admitted the allegations of the bill in equity filed herein, and consented to the appointment of receivers of its property, as prayed for in the bill of complaint, and thereupon, and on or about August 26, 1932, Victor J. Dowling and Thomas E. Murray, Jr., were duly

appointed temporary Receivers of the above-named defendant and of all of the property of said defendant, and thereafter the said Thomas E. Murray, Jr., qualified as Receiver.

2. By order of this Court appointing the said Receivers, said Receivers were authorized, inter alia, to take possession of all the properties and assets of the said defendant and to run, manage and operate the railroads, properties and assets of the said defendant and to exercise the authority and franchises of the said defendant and discharge its public duties and to preserve and protect its system, properties and assets in proper condition and repair and to protect the title and possession and secure and develop the business of the same and to collect and receive the rents, income, tolls and profits of the railroads, properties and assets of the said defendant.

3. By order of this Court in appointing the said Receivers, it was ordered that at 10.30 o'clock in the forenoon on September 22, 1932, at Room 439 at the United States Post Office Building in the City of New York, the parties to the above-entitled suit show cause before the Hon. Martin T. Manton, a United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York, why such receivership should not be continued during the pendency of the above-entitled suit and upon the hearing thereof any other creditor of the said defendant or other party in interest may be heard.

4. On or about August 26, 1932, a suit was commenced by the above-named plaintiff in the United States District Court for the Eastern District of New York, against the above-named defendant, by filing in said Court a creditor's bill in equity against said defendant. On or about said day said defendant appeared in said action, and by its answer admitted the allegations of said bill in equity and consented to the appointment of temporary receivers of said defendant and of all of the property of said defendant

(ancillary to the appointment of Receivers thereof by this Court), as prayed for in the complaint, and thereupon, and on or about August 26, 1932, the said Victor J. Dowling and Thomas E. Murray, Jr., were duly appointed temporary Ancillary Receivers of the above-named defendant, ancillary to their appointment as temporary Receivers by this Court.

5. On or about October 1, 1922, the above-named defendant entered into an indenture, dated as of October 1, 1922, by and between the above-named defendant, party of the first part, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the United States of America, as Trustee, party of the second part. Said indenture provided for the issuance of not exceeding $15,000,000 Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of the above-named defendant. Upon information and belief, the above-named defendant has issued under said indenture $10,500,000 Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, all of which are now outstanding.

6. The above-named defendant by its answer in the above-entitled suit has admitted that it is and will be without financial resources to meet in full specified contractual obligations, including the six months' interest on the Ten-Year Six Per Cent. Gold Notes due October 1, 1932, amounting to $315,000, and the principal of said Ten-Year Six Per Cent. Gold Notes due and payable October 1, 1932, amounting to $10,500,000.

7. Your petitioners are acting as a Committee for the protection of the holders of the said Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of the above-named defendant, under a Deposit Agreement, dated as of July 18, 1932, a copy of which is annexed hereto and made a part hereof; and, as such Committee, represent the holders of a substantial number of said Ten-Year Six Per Cent. Gold Notes due October 1, 1932.

8. The conduct of the receivership involves questions which are of serious import to the holders of said Ten-

Year Six Per Cent. Gold Notes, due October 1, 1932, of the above-named defendant and questions of business policy in the determination of which your petitioners desire to advise and co-operate with the Receivers and their solicitors.

9. It is the purpose and wish of your petitioners to assist and co-operate with this Court and the Receivers, and, when addressed, your petitioners will be ready and willing to present to this Court the views of your petitioners and the noteholders whom they represent in any matter or thing upon which your petitioners' views may be requested.

10. This petition is executed by Charles Hayden, the Chairman of said Committee, and said Charles Hayden has been authorized so to do by said Committee.

WHEREFORE, it is respectfully prayed that an order permitting the intervention of your petitioners, in form and substance as hereto annexed, be issued by this Court, for all of which no other or previous application has been made.

CHARLES HAYDEN,
EARLE BAILIE,
GRAYSON M.-P. MURPHY,
ALBERT H. WIGGIN,
WILLIS D. WOOD,
constituting a Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company,

by CHARLES HAYDEN,
Chairman.

ROOT, CLARK & BUCKNER,
Solicitors for Petitioners,
Office & P. O. Address,
31 Nassau Street,
Borough of Manhattan,
New York City.

(Below-described Deposit Agreement was attached)

INTERBOROUGH RAPID TRANSIT COMPANY

TEN-YEAR SIX PER CENT. GOLD NOTES

DUE OCTOBER 1, 1932.

DEPOSIT AGREEMENT

Dated as of July 18, 1932.

CHARLES HAYDEN, Chairman
EARLE BAILIE
GRAYSON M.-P. MURPHY
ALBERT H. WIGGIN
WILLIS D. WOOD

Committee

Counsel
ROOT, CLARK & BUCKNER,
31 Nassau Street,
New York, N. Y.

Secretary
RAYMOND B. HINDLE,
25 Broad Street,
New York, N. Y.

Depositary
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
11 Broad Street,
New York, N. Y.

Doc. 13

Petition of Manhattan Railway Company for Extension of Receivership and Appointment of Separate Receiver for Lessor.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

743 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff,

against

INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.

In Equity E 70-364

IN THE MATTER OF The Petition of MANHATTAN RAILWAY COMPANY.

744 The petition of Manhattan Railway Company, by Dills, Muecke & Schelker, its solicitors, respectfully shows as follows:

FIRST: This cause is a general creditor's suit. For the contents of the Bill of Complaint and of the answer of the defendant to said bill, reference is made to said bill and answer of record in this cause.

By an order of this court duly entered in this cause on August 26, 1932, made on the Bill of Complaint and on the answer of the defendant thereto, Victor J. Dowling and Thomas E. Murray, Jr., were duly appointed tempo-

rary receivers of the defendant, Interborough Rapid Transit Company, and of its properties, with the powers and duties prescribed in said order. For the precise terms of said order reference is made to the original order of record in this cause. Thomas E. Murray, Jr., one of the receivers appointed by this court as aforesaid, has duly qualified as such receiver and has entered into possession of the properties of said defendant, including the properties leased to it by the petitioner as hereinafter set forth, and is now operating the same and collecting the rents, issues and profits thereof.

SECOND: Your petitioner, a railroad corporation, organized and existing under the laws of the State of New York, owns a system of elevated railroads in the Borough of Manhattan and the Bronx, in the City of New York, which system of railroads your petitioner leased to the defendant for the term of nine hundred and ninety-nine (999) years from November 1, 1875, under the terms and conditions and for the rentals in said indenture of lease set forth. At the time of the appointment of the receivers in this cause the defendant was in possession of and operating the elevated railroads leased to it by the petitioner.

In and by the aforesaid lease the defendant as lessee covenanted and agreed that it would each and every year during the term of the lease from January 1, 1906, pay to the petitioner as lessor, as rent for the demised property, annual dividends at the time specified in the lease at the rate of 7% per annum on the shares of stock of the petitioner.

The defendant as lessee assumed and covenanted and agreed to pay to the lessor as rent, as the same became due, the interest on the outstanding bonds of the petitioner as lessor.

The defendant as lessee covenanted and agreed that it would pay and discharge as rent, as and when the same became due, any and all taxes, assessments and charges

whatsoever, levied, assessed or imposed upon the petitioner as lessor, its capital, or shares of capital stock, or dividends, or upon the demised railroads, premises, real estate, personal property, franchises, assessments or any part thereof, or the business, earnings or income of the lessor, or for the use or enjoyment thereof, by the United States, state, municipal or other lawful authority.

At the time the receivers were appointed herein there were outstanding the following securities of your petitioner:

749 $40,683,000 principal amount of Consolidated Mortgage 4% Bonds issued under and pursuant to and secured by an Indenture dated February 26, 1890, and a Supplemental Indenture dated June 13, 1899, between your petitioner and Central Trust Company of New York (now Central Hanover Bank and Trust Company) whereby there is mortgaged all the railroad properties and certain other properties of your petitioner;

$4,523,000 of Second Mortgage 4% Bonds issued under and pursuant to and secured by an Indenture dated June 1, 1913, between your petitioner and The Equitable Trust Company (now The Chase National Bank of the City of New York) whereby there is mortgaged all the railroad properties and
750 certain other properties of the petitioner, but subject to the lien created by said Indentures to Central Trust Company of New York (now Central Hanover Bank and Trust Company);

600,000 shares of capital stock of the par value of $100 each.

In 1922 a voluntary Plan of Readjustment was made in and by which it was provided that as to all holders of capital stock of the petitioner, who should assent to the Plan of Readjustment, the 7% annual rate of guaranteed

dividend rental on such capital stock as fixed in the aforesaid lease from the petitioner to defendant should be reduced, subject to the terms and conditions of the Plan of Readjustment, to the rate of 5% per annum after July 1, 1924, with the provision that in any fiscal year in which neither the net earnings of the defendant, nor the net earnings of the "Manhattan Leased Lines" as defined in the Plan of Readjustment would be sufficient to pay the whole of such guaranteed dividend rental, the defendant should pay and distribute as provided in the aforesaid lease on account of such dividend rental an amount equal to the net earnings of the Interborough Company or the net earnings of the "Manhattan Leased Lines," whichever amount should be the larger.

Taxes in excess of $860,000 against the special franchises and real estate belonging to the petitioner have become due and are now unpaid. In the complaint herein (paragraph 13) it is alleged as follows:

> "On information and belief, that the defendant has neglected and failed to pay certain taxes for 1932 duly assessed by the City of New York against the special franchises and real estate belonging to the Manhattan Railway Company, the amount of such unpaid taxes with interest now due thereon being in excess of $860,000; that defendant's lessor, Manhattan Railway Company, has formally demanded in writing that such taxes be paid but that defendant has neglected and failed and continues to neglect and fail to comply with such demand and make such payment; on information and belief that such failure and such refusal constitutes an act of default on the part of the defendant under the aforesaid lease from the Manhattan Railway Company and if continued for a period of ninety (90) days from the date of demand of the Manhattan Railway Company, will constitute an additional act of default under the terms of the defendant's First and Refunding Mortgage."

754 The foregoing allegation of the complaint is admitted by the answer herein.

In the complaint herein (paragraph 15) it is alleged on information and belief that the defendant is and will be without financial resources to meet in full certain contractual obligations which are required of it through the terms of its mortgage, the indenture securing its notes, and the lease of the petitioner, which include the following:

> "Rental payments due under the lease from Manhattan Railway Company, amounting to $914,802.50, on October 1, 1932, being interest on the
755 Manhattan 4% Bonds and rental for one quarter on the non-assenting Seven Per Cent. Stock of the Manhattan Company;
>
> "Rental payments due under the said Manhattan lease on December 1, 1932, amounting to $90,460."

The foregoing allegation of the complaint is admitted by the answer.

THIRD: In and by the aforesaid lease of the petitioner to defendant there is the following provision in respect of default by the defendant on performance of the covenants and agreements contained in the lease:

> "The lessee further covenants and agrees that in
756 case of default by it in the payment of the cash or dividend rentals in this lease reserved and agreed to be paid, and if said rentals, or any part thereof, shall remain unpaid for the space of ninety days from and after the time when they shall become due and payable, or if the said lessee shall be in default in the performance of any of the covenants or agreements in this lease contained and on its part to be kept and performed as aforesaid, and such default shall continue for the period of ninety days after notice and demand of performance by the

lessee, given in writing by the lessor to the lessee, or if the lessee shall fail or refuse to comply with any decision of arbitrators appointed as herein provided, for sixty days after service of notice of such decision upon it, then, and in any of said events, the term by this lease created, granted and demised shall at the option of the said lessor expire and cease and determine, and the lessor shall have the right to enter upon and take possession of all and singular the property by this lease granted and demised, and the same have and possess and enjoy as of its former estate, and without such entry may recover possession thereof in the manner provided by statute, by summary proceedings; it being covenanted and agreed that the term hereby granted shall expire after continued default as aforesaid, at the election of the lessor and upon written notice of such election being served on the lessee, and that all right of any further demand or re-entry other than that above specifically referred to is hereby waived by the lessee. The foregoing remedies are cumulative and shall not be construed to take away or abridge any other remedy, or right existing by law, or under any other provision of this lease."

In each of the two mortgages of the petitioner securing its outstanding bonds there are provisions that, on defaults in the payment of the interest on the outstanding bonds and the continuance of such defaults for short periods respectively set forth in said respective mortgages, proceedings may be instituted by the Trustees respectively named in the respective mortgages and shall be instituted by said Trustees respectively upon the request of a specified number of holders of bonds secured by such mortgages respectively to foreclose the liens of the respective mortgages.

760 *American Brake Shoe Record.*
Petition for Extension of Receivership.

FOURTH: The interest on the aforesaid bonds is payable semi-annually until the bonds mature. The entire system of elevated railroads of the petitioner is now in the possession of this court through its said receivers appointed in this cause. The defendant by the terms of the aforesaid lease agreed to pay the interest on the bonds of the petitioner as it became due. Your petitioner has no resources with which to meet the interest on the mortgage indebtedness of its system of elevated railroads leased to the defendant, or to meet the other indebtedness and liabilities of your petitioner other than the rentals payable under the lease made by your petitioner to the de-
761 fendant, as part of which said defendant agreed to pay such fixed charges and such rentals and to perform the other covenants therein contained.

FIFTH: In the complaint herein (paragraph 6) there is the following allegation:

> "On information and belief that on or about March 19, 1913, the Public Service Commission for the First District issued to the defendant, and the defendant accepted a certain certificate for the construction, equipment, maintenance and operation of certain extensions to the elevated lines, or some of them, operated by the defendant under said lease; and that said elevated extensions have been con-
762 structed and equipped and are now operated by the defendant under the terms of said certificate in conjunction with, and as a part of the elevated system leased by the defendant from said Manhattan Company."

The foregoing allegation is admitted by the answer.

Since the lease by the petitioner to the defendant was made the defendant has operated under a single management and as a single system all the lines owned, controlled and operated by it including the subways leased to it by the City of New York and the elevated railroads leased to it by the petitioner.

In view of the foregoing facts the rights of your petitioner are very closely interwoven with rights which this court has undertaken to administer in this cause.

Your petitioner prays:

1. That your petitioner may become party defendant to said suit for the protection of its interests and those of its creditors.

2. That the receivership under the Bill of Complaint in this cause be extended so as expressly to embrace the interest of your petitioner in said property, your petitioner submitting itself and its property to the jurisdiction of this court, and that such extension of such receivership shall not be deemed in any way to prejudice, affect, impair, diminish, enlarge or augment the rights of Manhattan Railway Company against Interborough Rapid Transit Company or its said receivers, or in any way to prejudice, affect, impair, diminish, enlarge or augment the rights of Interborough Rapid Transit Company or its said receivers against Manhattan Railway Company.

3. That said receivers be further directed to keep separate accounts of the railroads owned by the petitioner and now in possession of the receivers herein, and that the rents, issues, profits and income from such properties be segregated and applied under the orders or decree of this court to the end that said railroads and property of your petitioner may be protected and preserved.

4. That your petitioner may have such further relief as may be just.

MANHATTAN RAILWAY COMPANY,
By CHAS. G. MULLIN,
Secretary.

DUANE R. DILLS,
DILLS, MUECKE & SCHELKER,
Solicitors and Counsel for Petitioner,
New York City, New York.

Doc. 15

Notice of Motion for Leave to Intervene—Committee for Manhattan 7% Stock.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

Sirs:

You and each of you will PLEASE TAKE NOTICE that as Solicitors for Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, acting as the Protective Committee for the Seven Per Cent. Guaranteed Stock of the Manhattan Railway Company, we have filed in the office of the Clerk of this Court in the above entitled cause their petition for intervention and motion for leave to intervene herein, copies of which said petition and motion for leave to intervene are hereto attached and herewith served upon you and each of you; and that we shall move the Court on Monday, September 12, 1932, at eleven o'clock A. M. on that day, or as soon thereafter as counsel can be heard, in Room 439, Old

Post Office Building, for an order allowing intervention, and for such further relief in the premises as may be just.

Dated, New York, September 8, 1932.

Yours, etc.,

MARSHALL & WEHLE,
Solicitors for Petitioners,
No. 50 Broadway,
New York, N. Y.

To:

MESSRS. CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., Temporary Receiver of Interborough Rapid Transit Company,
25 Broadway, New York, N. Y.

MESSRS. HUGHES, SCHURMAN & DWIGHT,
Solicitors for William Roberts, Temporary Receiver of Manhattan Railway Company,
100 Broadway, New York, N. Y.

Doc. 16

Proposed Order—Intervention of Committee for Manhattan 7% Stock.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against 773 INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

This cause coming on to be heard upon the petition for intervention by Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee for holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company, and upon motion pursuant thereto, and the Court being duly advised, it is

ORDERED that said Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee for Manhattan Rail-
771 way Company Seven Per Cent. Guaranteed Stock, be and they hereby are permitted to intervene as such Protective Committee in this cause as a party-defendant, and to appear for and represent owners and holders of such stock who may make deposits with said Committee; and that notices of further proceedings in this cause shall be served upon Messrs. Marshall & Wehle, No. 50 Broadway, New York City, Solicitors for said Committee.

Dated, New York, N. Y., September , 1932.

.....

U. S. D. J.

Doc. 17

Motion for Leave to Intervene—Committee for Manhattan 7% Stock.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

Come now Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, owning and representing certain shares of capital stock of Manhattan Railway Company called Seven Per Cent. Guaranteed Stock and acting as the Protective Committee for holders of such stock pursuant to a Deposit Agreement as of August 26, 1932, who, as such Committee and on behalf of such holders of such stock as may make deposits under said Deposit Agreement, move the Court for leave to the petitioners as such Protective Committee to intervene as a party-defendant in this cause.

Dated, New York, N. Y., September 8, 1932.

MARSHALL & WEHLE,
Solicitors for Petitioners.

Petition for Intervention by Protective Committee for Holders of 7% Guaranteed Stock of Manhattan Railway Company.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

779

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Your petitioners, Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee acting for holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company, which stock will be hereinafter more fully described, are acting for themselves and also on behalf of other holders of such stock who have already deposited or may hereafter deposit their stock with the Depositary acting under a certain Protective Agreement executed by your petitioners as of August 26, 1932, and respectfully state:

780

FIRST: That the said Seven Per Cent. Guaranteed Stock of Manhattan Railway Company is the stock to the holders of which the defendant herein, Interborough Rapid Tran-

78

sit Company, by instrument of January 1, 1903, as set forth in the eleventh paragraph of the bill of complaint herein, undertook to pay annually an amount equal to seven per cent. (7%) per annum upon each share; that as set forth in the said eleventh paragraph of the bill of complaint said undertaking of said defendant herein to pay such seven per cent. annually upon such stock originally applied to 600,000 shares thereof, but that as to 556,490 shares thereof, now known as "Manhattan Railway Modified Stock," the rights of holders have come to be modified by contract; and that the said original obligation and liability of said defendant, Interborough Rapid Transit Company, to pay annually said seven per cent. applies 782
only to 43,510 shares of said capital stock of Manhattan Railway Company, which stock is commonly referred to, and is herein mentioned as its "Seven Per Cent. Guaranteed Stock."

SECOND: That the said obligation of said defendant herein, Interborough Rapid Transit Company, to the holders of such Seven Per Cent. Guaranteed Stock is evidenced upon the face of each certificate for such stock, by its express undertaking in the following words and figures:

> "Dividends amounting to six per cent. per annum and an additional amount, if earned, not exceeding one per cent. per annum, until January first, 1906, and after that date, dividends amounting to seven 783
> (7) per cent. per annum, upon the par value of the outstanding capital stock of the Manhattan Railway Company are guaranteed, and will be paid by the undersigned, in accordance with the terms and provisions of a certain Indenture made between the Manhattan Railway Company and the undersigned, dated the first day of January, 1903.
>
> INTERBOROUGH RAPID TRANSIT COMPANY,
> by.....
> Treasurer."

84 *American Brake Shoe Record.*
Petition for Leave to Intervene.

THIRD: That your petitioners for some time past have personally owned and now own, or as agents or fiduciaries have represented and now represent, a substantial amount of the said 43,510 shares of Seven Per Cent. Guaranteed Stock presently outstanding; that your petitioners, acting as such Protective Committee, as shown by published notices of August 26th and August 27th, 1932, copies of which are attached hereto as Exhibit "1," made its first call for deposits of Seven Per Cent. Guaranteed Stock and also mailed to all holders of record on the books of Manhattan Railway Company as of August 22, 1932, a call
785 for such stock and also a copy of the Protective Agreement hereinabove referred to, and that the Depositary named in said published notices and in said Protective Agreement is now in the course of receiving deposits pursuant to such call.

FOURTH: That on August 26, 1932, in this cause, temporary receivers were appointed for the defendant herein, Interborough Rapid Transit Company; and that thereafter on September 6, 1932, in this cause, and upon petition of Manhattan Railway Company, a temporary receiver was appointed for Manhattan Railway Company.

FIFTH: That through the said undertaking of defendant, Interborough Rapid Transit Company, as set forth
786 in paragraphs second and third hereof, there will be due on October 1, 1932, to the holders of said Seven Per Cent. Guaranteed Stock a payment equal to $1.75 upon each share thereof, or an aggregate amount of $76,142.50.

SIXTH: That the policies to be determined upon by the said temporary receivers of the defendant, Interborough Rapid Transit Company, and of the Manhattan Railway Company from time to time as officers of this Court through proceedings in this cause with regard to the said undertaking of January 1, 1903, of the defendant herein,

Interborough Rapid Transit Company, hereinabove set forth, or any of the matters referred to in the bill of complaint herein, or in other matters, will profoundly involve and affect the rights of the holders of the said Seven Per Cent. Guaranteed Stock of Manhattan Railway Company; and that by reason of the interest which they represent, your petitioners should be allowed to intervene in this cause.

WHEREFORE, your petitioners pray that an order be entered herein permitting your petitioners as the Protective Committee for Manhattan Railway Company Seven Per Cent. Guaranteed Stock to intervene as a party-defendant in this cause and for such other and further relief as to this Court may seem proper.

Dated, September 8th, 1932.

HAROLD PALMER,
NORMAN JOHNSON,
STANLEY R. LATSHAW,
HAROLD SWAIN,
JOHN W. APPEL, JUNIOR,
as the Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company,

by HAROLD PALMER,
Chairman,

NORMAN JOHNSON,
Secretary.

MARSHALL & WEHLE,
Solicitors.

790

Exhibit 1, With Petition for Intervention by Protective Committee.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

791

(N. Y. Sun, 8/26/32)

PROTECTIVE COMMITTEE

MANHATTAN RAILWAY COMPANY

Seven Per Cent. Guaranteed Stock

CALL FOR DEPOSIT

To the Holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company.

792 In the critical situation for holders of the 7 per cent guaranteed stock of the Manhattan Railway Company brought about by the appointment of receivers for the Interborough Rapid Transit Company, lessee of the Manhattan properties, the undersigned, owning or controlling substantial amounts of the stock, have consented to serve as a protective committee to safeguard its interest.

We urge immediate deposit of your stock under terms of a brief deposit agreement which has already been executed by us, copies of which are being mailed to stock-

holders of record and can also be obtained from the Depositary.

New York, N. Y., August 26, 1932.

MARSHALL & WEHLE,
50 Broadway,
New York, N. Y.,
Counsel

THE COMMERCIAL NATIONAL BANK & TRUST COMPANY OF NEW YORK,
Depositary,
50 Wall Street,
New York

HAROLD PALMER,
Chairman

NORMAN JOHNSON,
Secretary,
50 Broadway,
New York, N. Y.
(Phone: CAledonia 5-4838)

JOHN W. APPEL, JR.
STANLEY R. LATSHAW
HAROLD SWAIN

(N. Y. Times, 8/27/32)

NOTICES TO SECURITIES OWNERS

Redemption—Dividends—Meetings—Sinking Funds—Other Notices

The New York Times has a greater circulation among financiers and investors than any other American newspaper

FINANCIAL NOTICES

PROTECTIVE COMMITTEE
MANHATTAN RAILWAY COMPANY
Seven Per Cent. Guaranteed Stock

CALL FOR DEPOSIT

To the Holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company:

In the critical situation for holders of the 7% guaranteed stock of the Manhattan Railway Company brought about

by the appointment of receivers for the Interborough Rapid Transit Company, lessee of the Manhattan properties, the undersigned, owning or controlling substantial amounts of the stock, have consented to serve as a protective committee to safeguard its interests.

We urge immediate deposit of your stock under terms of a brief deposit agreement which has already been executed by us, copies of which are being mailed to stockholders of record and can also be obtained from the Depositary.

New York, N. Y., August 27, 1932.

MARSHALL & WEHLE,
50 Broadway,
New York, N. Y.,
Counsel

THE COMMERCIAL NATIONAL BANK & TRUST COMPANY OF NEW YORK,
56 Wall Street,
New York, N. Y.,
Depositary.

HAROLD PALMER,
Chairman,

NORMAN JOHNSON,
Secretary,
50 Broadway,
New York, N. Y.
(Phone: DIgby 4-9556)

JOHN W. APPEL, JR.
STANLEY R. LATSHAW
HAROLD SWAIN

Doc. 19

Receivers' Petition Respecting Seven Per Cent. Notes.

RECEIVERS' APPLICATION NO. 2—SEPTEMBER 1, 1932.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. E 70-364

80

The petition of Thomas E. Murray, Jr., Receiver herein, acting on behalf of and for both Receivers who were duly appointed by an order of this Court, dated August 26, 1932, in the above-entitled cause, upon information and belief, respectfully shows to this Court as follows:

801

1. On August 26, 1932, by an order of this Court, your petitioner and Victor J. Dowling were duly appointed Receivers herein, and your petitioner has duly executed and filed the bond required by the terms of said order, and is now acting as such Receiver, Victor J. Dowling being at present absent from the United States.

2. From such limited investigation and examination of the affairs of the defendant, Interborough Rapid Transit Company, as your petitioner has been able to make in the

brief time that has elapsed since August 26, 1932, he is informed and believes, and upon such information and belief states the following:

3. Under a Collateral Indenture dated September 1, 1922, between the defendant and Bankers Trust Company of New York, as Trustee, there have been issued and are now outstanding Thirty-one million six hundred seventy-two thousand one hundred Dollars ($31,672,100) principal amount of Ten-Year Convertible 7% Gold Notes of the defendant, which by their terms mature and become due and payable on September 1, 1932. Bankers Trust Com-
803 pany, as the Trustee named in and acting under said Indenture, has in its possession more than Fifty-four million Dollars ($54,000,000) principal amount of First and Refunding Mortgage 5% Gold Bonds of the defendant as security for said Notes. Said Bankers Trust Company is a corporation organized and existing under the laws of the State of New York, and its principal office is located in the County of New York in said State.

4. According to the provisions of said Collateral Indenture, said Bonds were issued under and pursuant to a First and Refunding Mortgage of the defendant dated March 20, 1913, to Guaranty Trust Company of New York, as Trustee; in addition to such Fifty-four million Dollars ($54,000,000) principal amount of such First and Refund-
804 ing Mortgage 5% Gold Bonds there are outstanding in the hands of the public more than One hundred thirty-two million Dollars ($132,000,000) in principal amount of such First and Refunding Mortgage 5% Gold Bonds.

Said Collateral Indenture, in Article Six thereof, contains the following provisions, among others:

> "SEC. 2. In case of the happening of one or more of the following events—elsewhere in this indenture sometimes termed 'events of default'—that is to say:

(1) Default in the due and punctual payment of the principal of any of the notes hereby secured, when the same shall have become due and payable, whether at maturity or by declaration or otherwise;

(2) Default in the payment of any interest on any of the notes hereby secured, when and as the same shall have become payable as therein and herein expressed, which default shall have continued for the period of thirty days;

* * * * * *

(6) A receiver of the Company or its property shall be appointed, and the order of the Court appointing such receiver shall continue in effect for the period of sixty days;

* * * * * *

SEC. 3. In case of the happening of one or more of the events of default enumerated in Section 2 of this Article Six, then, and in each and every such case, the Trustee in its discretion shall be entitled, either personally or by its agents or attorneys, to proceed, and forthwith may proceed, to sell and convert into money, singly or collectively, the pledged bonds; and upon the written request either of the holders of not less than 25% in principal amount of the notes at the time outstanding, or of any one holder of not less than 10% in amount of such notes who shall have been the holder of notes to that amount for at least six months next preceding the delivery of such request, and upon being indemnified as hereinafter provided, it shall be the duty of the Trustee so to do.

Such sale or sales shall be at public auction at such place in the Borough of Manhattan, City of New York, State of New York, and at such time

and upon such terms as the Trustee may fix and briefly specify in the notice of sale to be given as herein provided or as may be required by law.

Notice of any sale, whether under and by virtue of the power of sale herein conferred, or under or by virtue of any judgment or decree of foreclosure and sale or any other judicial proceedings, shall state the time when and the place where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be sufficiently given if published once in each week for four successive weeks prior to such sale in two newspapers of general circulation in the Borough of Manhattan, City of New York.

The Trustee may adjourn from time to time any sale by it to be made under the provisions of this indenture by announcement at the time and place appointed for such sale or for such adjourned sale or sales; and without further notice or publication, it may make such sale at the time and place to which the same shall be so adjourned."

5. Your Receivers have not now, nor by borrowings or otherwise prior to September 1, 1932, or within any time that can now be foreseen in the near future will they be able to procure, a sufficient amount of funds with which to pay the principal amount and interest of such Notes so falling due September 1, 1932.

6. In the brief time which has elapsed since the appointment of your Receivers they have not been able to investigate the facts as to the issuance of said Notes and the pledged security, nor any other phase of the above situation sufficiently to have any well-informed opinion as to, or to aid the Court in passing upon or instructing your Receivers how to act with reference to, the rights of Bankers Trust Company as such Trustee, the holders of the Thirty-one million six hundred seventy-two thou-

sand one hundred Dollars ($31,672,100) principal amount of said Ten-Year Convertible 7% Gold Notes, the defendant company, its other creditors and other persons interested in it, and your Receivers, with respect to or concerning such Fifty-four million Dollars ($54,000,000) principal amount of First and Refunding Mortgage 5% Gold Bonds.

Your Receivers require at least sixty days to make a full investigation of all the facts respecting the issuance of said Notes and the Bonds pledged to secure the same, for the purpose of making recommendations as to the action which should or might be taken with respect to said Notes.

WHEREFORE, your petitioner prays that this Honorable Court take under advisement the action to be taken by the Receivers with respect to the aforesaid matters until the Receivers have had an opportunity to make a full investigation of all of the foregoing matters so as to make recommendations to the Court with respect thereto; and for such other and further relief in the premises as the Court may deem proper, just and reasonable.

Dated, New York, N. Y., September 1st, 1932.

THOMAS E. MURRAY, JR.,
Receiver as aforesaid.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Receivers.

Doc. 20

Petition for Order Granting Leave to Intervene to Committee for Manhattan Railway Company Consolidated Mortgage Gold Four Per Cent. Bonds.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

815

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

To the Judges of the District Court of the United States for the Southern District of New York:

The petition of Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee
816 Loomis, as the Protective Committee acting for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, due April 1, 1990 (hereinafter called the "Bonds"), on behalf of themselves and on behalf of all other holders of such Bonds who may deposit their Bonds with the Protective Committee, respectfully shows as follows:

(1) The Protective Committee has been formed for the purpose of protecting the interests of all holders of the Bonds who shall deposit their Bonds with the Protective Committee.

(2) The undersigned members of the Protective Committee themselves represent a large amount of the Bonds, and other holders of large amounts of the Bonds have agreed with the Protective Committee to deposit their Bonds with the designated Depositary of the Protective Committee. The Protective Committee has called for the deposit of Bonds and a published notice to that effect will shortly appear.

(3) On August 26, 1932, in a suit in equity brought by one of the creditors of the Interborough Rapid Transit Company, Presiding Judge Martin T. Manton of the United States Circuit Court of Appeals, sitting as a District Judge in this Court, appointed as Temporary Receivers of Interborough Rapid Transit Company and its property the Honorable Victor J. Dowling and Mr. Thomas E. Murray, Jr.

(4) That on or about September 2, 1932, Manhattan Railway Company filed its petition before this Court in the above-entitled cause, praying that said Manhattan Railway Company should be made a party defendant in this cause and that the receivership in this cause be extended so as expressly to embrace the interests of Manhattan Railway Company in the property in the possession of the said Temporary Receivers Victor J. Dowling and Thomas E. Murray, Jr.

(5) Your petitioners are informed and believe that numerous questions of great importance vitally affecting the interests of the Bonds represented by the Protective Committee will be raised in the above-entitled cause and will come before this Court for its decision thereon. Your petitioners refer to the bill of complaint herein of the American Brake Shoe and Foundry Company, plaintiff, and to the petition herein of Manhattan Railway Company, wherein the facts with regard to certain of these matters are set forth at length.

(6) Your petitioners, as such Protective Committee, allege that, in view of the importance to the Bonds which they represent of the questions which will arise from time to time in this cause, they should be permitted to intervene in this cause.

WHEREFORE, your petitioners pray that an order be entered herein permitting your petitioners, as the Protective Committee acting for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, to intervene as a party defendant in this cause with the right to plead on behalf of the holders of the Bonds and to be heard on all matters arising in this cause, and that your petitioners be entitled to notice of all proceedings herein and that your petitioners have such other and further relief as to this Court may seem just and proper.

Dated, New York, N. Y., September 6, 1932.

VAN SANTVOORD MERLE-SMITH,
WALTER BENNETT,
PHILIP A. BENSON,
FRED J. FULLER,
JAMES LEE LOOMIS,
as the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

By VAN SANTVOORD MERLE-SMITH.

COTTON, FRANKLIN, WRIGHT & GORDON,
Solicitors for Committee,

BOYKIN C. WRIGHT, of Counsel.

Doc. 21

Manhattan Railway Company Receivership—Affidavit Showing Action of and Approval by Manhattan Board of Directors.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity
No. E 70-364

In the Matter of the Petition
of
MANHATTAN RAILWAY COMPANY.

SOUTHERN DISTRICT OF NEW YORK,
COUNTY OF NEW YORK,
STATE OF NEW YORK, } ss.:

CHARLES G. MULLIN, being duly sworn, deposes and says that he is Secretary of Manhattan Railway Company, and in such capacity has charge and custody of the corporate books and records of the said company, including the minute book thereof.

That of his own knowledge, and from the said minute book of the said Manhattan Railway Company your deponent knows that there was held, on the 2nd day of September, 1932, at 10.30 o'clock in the forenoon of that day, at the office of Manhattan Railway Company at No.

165 Broadway, a special meeting of the Board of Directors of the said company, upon such due and proper notice to each and every of the directors of the said company as is provided in the by-laws thereof. That there was present at the said meeting a quorum of the directors of the said Manhattan Railway Company, and that the following resolutions were thereat adopted by the said Board of Directors:

"RESOLVED, in view of the appointment of the receivers of the Interborough Rapid Transit Company, who have taken possession of all the operating properties of this company, this company present its petition to the United States District Court for the Southern District of New York in the cause pending in that court, in which the American Brake Shoe and Foundry Company is plaintiff and Interborough Rapid Transit Company is defendant, to have this company made a party defendant to said suit for the protection of its interests and those of its creditors, and to have the receivership under the Bill of Complaint in that cause extended so as to embrace and include all the properties of this company, and that this company submit itself and its properties to the jurisdiction of the court in which said suit is pending; and

RESOLVED FURTHER, that the officers of this company be, and they hereby are authorized and directed to cause such a petition to be prepared and presented to the said court, to employ such counsel as in their judgment may be necessary for such purpose, to take any and all necessary steps and proceedings and do any and all acts deemed by them necessary or advisable, that this company may be made a party defendant in such suit and that such receivership may be extended so as to embrace all the property of this company."

That further your deponent knows of his own knowledge, and from the said minute book of the said Manhattan Railway Company, that there was held, on the 6th day of September, 1932, at 11.15 o'clock in the forenoon of that day, at the office of Manhattan Railway Company at No. 165 Broadway, a special meeting of the Board of Directors of the said company, upon such due and proper notice to each and every of the directors of the said company as is provided in the by-laws thereof. That there was present at the said meeting a quorum of the directors of the said Manhattan Railway Company, and that the following resolutions were thereat adopted by the said Board of Directors.

> "RESOLVED, that the resolution adopted by this Board at its meeting held on September 2, 1932, for the purpose of having this company made a party defendant in the suit in which the receivers of the Interborough Rapid Transit Company were appointed, and of extending the receivership to the properties of this company, be and the same hereby is in all respects approved, ratified and confirmed, and it is
>
> FURTHER RESOLVED, that any and all acts of the officers of this company taken under and by virtue of said resolution be, and the same hereby are in all respects approved, ratified and confirmed."

(Sd.) CHARLES G. MULLIN.

Sworn to before me this
8th day of September, 1932.

(Sd.) SPENCER A. STUDWELL,
Notary Public,
Westchester Co.
N. Y. Co. Clk's No. 1473, Reg. 3S-931.
Term expires Mar. 30, 1933.

(Seal)

Doc. 22

Receivers' Application No. 3—September 8, 1932.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70 364 RECEIVERS' PETITION.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers herein of Interborough Rapid Transit Company, upon information and belief respectfully shows to this Court as follows:

1. That in the administration of this estate numerous proceedings will be necessary, involving the filing of many papers and documents.

2. That in order that your Receivers may be able to maintain an orderly and careful record of all proceedings in this cause and of all documents and papers to be filed in connection with the administration of the estate, your petitioners desire to number the various Receivers' petitions and orders which may be entered by this Court and

any other documents or papers which may be filed herein, and to refer in any subsequent papers or documents to such previous papers by the numbers contained on such documents and papers.

WHEREFORE, your petitioners pray that an order be made by this Court authorizing and permitting the Receivers to number the various documents and papers filed in this cause, and any parties in these proceedings may refer to such documents and papers by the numbers contained thereon.

Dated, New York, N. Y., September 8th, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers of Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Receivers,
Office and P. O. Address:
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE, of Counsel.

Doc. 22

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364 NOTICE AND WAIVER OF CONSENT.

839

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.

840

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes.

American Brake Shoe Record.
Consent to Granting Application.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

ROOT, CLARK & BUCKNER,
Attorneys for the Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

COTTON, FRANKLIN, WRIGHT & GORDON,
Attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for the Receiver of Manhattan Railway Company.

Receivers' Application No. 4—September 8, 1932.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364 RECEIVERS' PETITION.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers herein of Interborough Rapid Transit Company, upon information and belief respectfully shows to this Court as follows:

1. That in the administration of this estate numerous proceedings will be necessary, involving records of considerable length and detail.

2. That in order that your Receivers may be able to maintain an orderly and careful record of all proceedings in this cause and of all documents and papers arising in the administration of the estate, your petitioners desire to cause to be printed all such records filed in said proceedings and any further documents and papers which your Receivers in their discretion desire to have so printed.

WHEREFORE, your petitioners pray that an order be made by this Court authorizing the Receivers to maintain a printed record of all documents arising in the proceedings in this cause and of any further documents and papers which your Receivers in their discretion desire to have so printed.

Dated, New York, N. Y., September 8th, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers of Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Receivers,
Office and P. O. Address:
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE, of Counsel.

Doc. 23

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364 WAIVER OF NOTICE AND CONSENT.

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes.

American Brake Shoe Record.
Consent to Granting Application.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

ROOT, CLARK & BUCKNER,
Attorneys for the Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

COTTON, FRANKLIN, WRIGHT & GORDON,
Attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for the Receiver of Manhattan Railway Company.

Doc. 24

Receivers' Application No. 5—September 8, 1932.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364 RECEIVERS' PETITION.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers herein of Interborough Rapid Transit Company, upon information and belief respectfully shows to this Court as follows:

1. That the appointment of your petitioners as Receivers of Interborough Rapid Transit Company, defendant herein, has necessarily left it without any cash resources with which to pay the ordinary and necessary current expenses for the registration and transfer of its outstanding shares of stock.

2. That your petitioners are of the opinion that it is desirable that the Receivers herein be authorized to pay, out of funds coming into their hands as Receivers, such expenses.

American Brake Shoe Record.
Receivers' Application No. 5.

WHEREFORE, your petitioners pray for an order authorizing said Receivers to pay, out of funds coming into their hands as such Receivers, all expenses necessary or proper to provide for the registration and transfer of the outstanding shares of stock of Interborough Rapid Transit Company.

Dated, New York, N. Y., September 8th, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers of Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Receivers,
Office and P. O. Address:
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE, of Counsel.

Doc. 24

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant,	In Equity E 70-364
863 against	WAIVER OF NOTICE AND CONSENT.
INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.
864

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes.

American Brake Shoe Record.
Consent to Granting Application.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

ROOT, CLARK & BUCKNER,
Attorneys for the Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

COTTON, FRANKLIN, WRIGHT & GORDON,
Attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for the Receiver of Manhattan Railway Company.

Doc. 25a

Receivers' Application No. 6, September 8, 1932, as to Postponement of Payment of State Franchise Tax.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant,	In Equity E 70-364
against	RECEIVERS' PETITION.
INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	

869

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers herein for Interborough Rapid Transit Company, upon information and belief respectfully shows to this Court as follows:

870

1. That your petitioners are in receipt from the Department of Taxation and Finance for the State of New York of a Notice of Assessment and Receipt, dated August 25, 1932, calling for the payment of $331,097.96, being the state franchise tax under section 185 of the New York State tax law, based upon the gross earnings of Interborough for the year ended June 30, 1932.

Your petitioners are advised that the amount of this tax is based upon the report filed by Interborough Rapid

Transit Company, and is divided between subway and elevated divisions as follows:

Manhattan Elevated Divisions....	$ 81,136.60
Subway Divisions.....	249,961.36

2. The penalty for non-payment of such tax amounts to five per cent of the tax due and unpaid, plus interest at the rate of one per cent per month during the period in which such tax remains unpaid.

3. Your petitioners have not had sufficient time to investigate the question of the legality of such franchise tax, the correctness of the amount, or the problem as to whether such matured and unpaid franchise tax and penalties, if any, which may result because of such non-payment, have any priority with respect to the assets of the receivership estate.

WHEREFORE, your petitioners pray that an order be entered in this court authorizing and directing your petitioners not to pay such franchise tax until such time as this court shall otherwise direct.

Dated, New York, N. Y., September 8, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers of Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for the Receivers of
Interborough Rapid Transit Company.

WM. WALLACE, of Counsel.

874 *American Brake Shoe Record.*
Waiver and Consent.

Doc. 25

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant,	In Equity E 70-364
875 against	WAIVER OF NOTICE AND CONSENT.
INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.
876

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes.

American Brake Shoe Record.
Waiver and Consent.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

ROOT, CLARK & BUCKNER,
Attorneys for the Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

Attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds.

Attorneys for the Receiver of Manhattan Railway Company.

Application No. 1 of Receiver of Manhattan Railway Company as to Appointment of Counsel.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff,	
881 against	
INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364
IN THE MATTER OF THE PETITION OF MANHATTAN RAILWAY COMPANY.	

To the Honorable Martin T. Manton, United States Circuit Judge designated to hold a term of the District Court of the Southern District of New York:

882

Now comes William Roberts and respectfully represents as follows:

By an order dated September 6, 1932, your petitioner was duly appointed Receiver of the above named Manhattan Railway Company and of all its property and assets. Your petitioner has duly filed his bond for the faithful performance of his duties and as such Receiver in the principal amount required by said order and thereupon duly qualified as such Receiver.

American Brake Shoe Record.
Manhattan Receiver's Application No. 1.

Your petitioner is of the opinion that it is imperative that he be permitted to employ counsel to represent him in the discharge of his duties as Receiver.

Your petitioner suggests that Messrs. Hughes, Schurman & Dwight, of 100 Broadway, City of New York, be appointed as such counsel and states that this suggestion is not made at the instance or request of any person other than petitioner.

Your petitioner deems Messrs. Hughes, Schurman & Dwight competent and qualified to represent him as such Receiver.

WHEREFORE, your petitioner prays that an order be entered herein granting leave to your petitioner to employ counsel for him as said Receiver in this Court and suggests that Messrs. Hughes, Schurman & Dwight, of 100 Broadway, Borough of Manhattan, City of New York, be appointed such counsel.

WILLIAM ROBERTS.

Sworn to before me this
6th day of September, 1932.

JAMES D. MCCAULEY,
Notary Public, Queens County.
(Seal) Certificate filed in New York County.
Commission expires March 30, 1933.
Queens County Clerk's No. 2548, Reg. No. 7579.
New York County Clerk's No. 273, Reg. No. 3Mc179.
Kings County Clerk's No. 27, Reg. No. 3088.
Bronx County Clerk's No. 15, Reg. No. 42Mc33.

Doc. 27

Affidavit by Counsel for Receiver of Manhattan Railway Company.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364
IN THE MATTER OF THE PETITION OF MANHATTAN RAILWAY COMPANY.	

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

RICHARD E. DWIGHT, being duly sworn, deposes and says:

I am an attorney at law, duly admitted to practice in the United States District Court for the Southern District of New York, and since the year 1906 have been a member of the firm of Hughes, Schurman & Dwight and its predecessor firms.

Neither I nor my firm, to the best of my knowledge, have had during the period of one year prior to the date of this affidavit any business, professional or other con-

nections with the subject-matter of this suit, with the parties or any creditor of the defendant Interborough Rapid Transit Company, or the defendant Manhattan Railway Company, or any other persons interested in the cause or in the receivership estate.

My firm frequently has acted as attorneys for both bankrupt and equity receivers in this court, and is acquainted with the principles and practices likely to be involved in this cause.

I know of no reason why I or my firm should not act as attorneys for the Receiver in this matter.

RICHARD E. DWIGHT.

Sworn to before me this
6th day of September, 1932.

JAMES D. MCCAULEY,
Notary Public,
(Seal) Queens County Clerk's No. 2548, Reg. No. 7579.
New York County Clerk's No. 273, Reg. No. 3Mc179.
Kings Co. Clerk's No. 27, Reg. No. 3088.
Bronx Co. Clerk's No. 15, Reg. No. 42Mc33.
Commission expires March 30, 1933.

Petition of Central Hanover Bank and Trust Company for Leave to Intervene.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. 70-364

PETITION OF CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE UNDER CONSOLIDATED MORTGAGE OF MANHATTAN RAILWAY COMPANY, FOR LEAVE TO INTERVENE AND BE MADE A PARTY.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in equity sitting:

Now comes Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage hereinafter mentioned, and respectfully shows:

1. Your petitioner is a corporation organized and existing under the laws of the State of New York, and it is the Trustee under a certain Consolidated Mortgage duly made by Manhattan Railway Company dated February

26, 1890, as supplemented by a certain indenture supplemental thereto duly made by said Manhattan Railway Company under date of June 13, 1899 (said Consolidated Mortgage, as supplemented by said supplemental indenture, being hereinafter termed the Consolidated Mortgage). Under said Consolidated Mortgage there have been duly authenticated by the Trustee $40,676,000 in principal amount of Consolidated Mortgage Gold Bonds (hereinafter termed bonds) due April 1, 1990, with interest at the rate of 4% per annum, payable semi-annually on October 1st and April 1st in each year, in the form provided for in said Consolidated Mortgage, all of which said bonds have been duly executed and issued by Manhattan Railway Company, and ever since have been and are now outstanding in the hands of bona fide holders thereof for value and secured by the aforesaid Consolidated Mortgage. In addition there are held by petitioner $7,000 in principal amount of said bonds for delivery in exchange for a like amount of outstanding Registered Bond Certificates of Manhattan Railway Company, as provided in said Consolidated Mortgage.

2. Default exists under said Consolidated Mortgage in that there have not been paid certain taxes, aggregating upwards of $780,000, which have been imposed against property of Manhattan Railway Company covered by said Consolidated Mortgage and have for some time past been due and payable; and by virtue of said default this petitioner is now entitled to take proceedings to enforce its rights under said Consolidated Mortgage in respect of the property, and the tolls, income, rents, issues and profits thereof, which are specifically pledged to your petitioner by said Consolidated Mortgage.

3. Substantially all of the property of said Manhattan Railway Company constituting the security for said Consolidated Mortgage was leased by Manhattan Railway Company to Interborough Rapid Transit Company by

lease dated January 1, 1903, for the term of 999 years from November 1, 1875, and is in the possession of this Court herein by Victor J. Dowling and Thomas E. Murray, Jr., as temporary Receivers appointed in the above-entitled cause by order dated August 26, 1932; and under date of September 6, 1932, this Court made an order herein extending said receivership to all of the property of Manhattan Railway Company, subject to the provisions of said order of September 6, 1932, and appointing William Roberts as temporary Receiver of the property of said Manhattan Railway Company. To the bill of complaint in the above-entitled cause, dated and filed herein on or about August 26, 1932, the order appointing said Interborough Receivers, dated and filed herein August 26, 1932, the petition of Manhattan Railway Company dated and filed herein on September 2, 1932, asking that it be made a party defendant, and for other relief, and said order dated and filed herein on September 6, 1932, this petitioner prays reference with the same force and effect as if herein set forth in full.

4. Under the aforesaid lease, Interborough Rapid Transit Company agreed to pay taxes of the nature aforesaid, as well as to pay the interest on the bonds secured by said Consolidated Mortgage and to make the other payments in said lease provided for. By the bill of complaint herein it is alleged, and by the answer of Interborough herein it is admitted, that Interborough has failed to pay certain taxes for 1932 duly assessed by the City of New York against the special franchises and real estate belonging to Manhattan, the amount of such unpaid taxes with interest then due being in excess of $860,000, and that such failure constitutes a default on the part of Interborough under said lease from Manhattan.

5. In and by Article Ninth of said Consolidated Mortgage, it is provided as follows:

> "NINTH: That so long as any of the bonds hereby secured shall be outstanding and unpaid, the Manhattan Company or its successor shall, at its own expense, maintain an office or agency in the City of New York for the payment of the interest coupons of said bonds, and the principal thereof at maturity, and for the registering of the principal of said bonds, as therein provided, at which office proper books shall be kept for such registry. Until the interest and principal of said bonds shall be fully paid, said Railway Companies, their successor and successors, shall promptly pay all taxes, assessments or other like charges lawfully laid, charged or imposed upon the mortgaged premises or any part thereof, including the property represented by any stocks, bonds or other like muniments or evidence of ownership deposited with or held by the Trustee as aforesaid, which may become prior to the lien of these presents; and that upon default by the said Railway Companies, or either of them, to pay any taxes, assessments or other like charges assessed or laid upon them, or either of them, or upon their property, whereby the lien of these presents might become impaired, the Trustee may, if so advised, and without impairment of or prejudice to any of its rights under this mortgage by reason of such default, itself pay the said taxes, assessments or other like charges, and have a lien upon the mortgaged premises for its advances for that purpose."

The original or a true copy of said Consolidated Mortgage will be produced upon the hearing hereof and filed herewith, if so directed by this Court.

6. During the course of said Interborough receivership and/or said Manhattan receivership, many questions will arise in respect of which this petitioner is entitled to adequate notice and the right to be heard, including such questions as the curing of the existing default under said lease, which constitutes also a default under the Consolidated Mortgage, the making of future payments under said lease, the failure to make some of which payments would result in default under the Consolidated Mortgage, the application of income coming into the hands of said Interborough Receivers and/or said Manhattan Receiver, and the preservation, operation and disposition of the property in the possession of this Court herein covered by said Consolidated Mortgage. For the reasons aforesaid, this petitioner has a vital interest in this litigation.

WHEREFORE, this petitioner prays for an order permitting it to intervene herein and making it a party hereto, and that petitioner may have such other and further relief as may be just and proper.

Dated: September 16th, 1932.

CENTRAL HANOVER BANK AND TRUST COMPANY,
By F. J. FULLER,
Vice-President.

Attest:

E. D. LA RUE,
Assistant Secretary.

DAVIES, AUERBACH & CORNELL,
Solicitors for Petitioner.

EDWARD CORNELL,
H. C. MCCOLLOM,
of Counsel.

Doc. 31.

Affidavit of Publication of Notice to Creditors.

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. E. 70-364. AFFIDAVIT.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:
BOROUGH OF MANHATTAN,

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK—THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. In Equity E 70-364.

To the Creditors of Interborough Rapid Transit Company:

PLEASE TAKE NOTICE that a hearing will be held on September 22, 1932, at Room 439 in the Old Post Office Building, Borough of Manhattan, City of New York, at 10.30 o'clock in the forenoon, why the receivership of the Interborough Rapid Transit Company should not be continued during the pendency of the above entitled suit, and that upon the hearing of said order to show cause

any creditor of Interborough Rapid Transit Company or other party in interest may be heard.

Dated, New York, September 8, 1932.

VICTOR J. DOWLING and
THOMAS E. MURRAY, JR.,
Receivers of Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Receivers of
Interborough Rapid Transit Company.

THOMAS J. NESTOR, being duly sworn, says that he is the Principal Clerk of the Publisher of the New York Evening Post, a daily newspaper printed and published in the City and County of New York, Borough of Manhattan; that the advertisement hereto annexed has been regularly published in the said "New York Evening Post" on the 13th day of September, 1932.

(Signed) THOMAS J. NESTOR.

Sworn to before me this
14th day of September, 1932.

(Signed) GEORGE TOBIN,
Notary Public, Kings County.
Co. Clerk's No. 72, Reg. No. 4073.
Certificate filed in N. Y. County Co. Clerk's No. 140, Reg. No. 4188.
Commission expires March 30, 1934.

(Notarial Seal)

Doc. 32

Amended and Substituted Petition for Intervention by Harold Palmer and Others as Protective Committee for Holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company (and Cross-Petition).

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

With leave of the Court, the petitioners, Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee, acting for the holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company, which stock will be hereinafter more fully described, amend their petition for intervention, dated September 8th, 1932, by striking therefrom the "First," "Second," "Third," "Fourth," "Fifth" and "Sixth" paragraphs thereof, and by substituting therefor the following paragraphs:

FIRST: 1. Your petitioners own over four thousand shares of the Common Stock of Manhattan Railway Company either beneficially or as fiduciaries for others, practically all of such holdings having been so owned and held by them for a number of years prior to institution of the proceedings in this cause.

16 *American Brake Shoe Record.*
Amended Petition of 7% Guaranteed Stock Prot. Com.

2. Your petitioners are acting as the Protective Committee for holders of the Seven Per Cent. Guaranteed Stock of Manhattan Railway Company under a Deposit Agreement executed by your petitioners on August 26th and 27th, 1932, a copy of which said Protective Agreement is attached hereto as Exhibit "1." In addition to the stock owned by your petitioners as hereinabove set forth, your petitioners, as such Protective Committee, hold through The Commercial National Bank and Trust Company, the Depositary under said Protective Agreement, substantial amounts of such stock in addition to such as has already
917 been deposited by members of the Committee; and your petitioners further have, through others, received trustworthy commitments by holders of such stock that they will deposit under said agreement shares of additional amounts beyond the shares above mentioned which aggregate between thirty-five hundred and four thousand in number. Further, your petitioners are in communication with various holders of such stock other than any of the stock mentioned above, and expect a substantial number of additional shares of stock to be deposited by them under said agreement within a few days.

3. A substantial amount of the stock which has been deposited, or as to which your Committee has such commitments of deposit, has been held by the present owners
918 thereof since prior to the year 1903.

4. Your petitioners as such Committee represent the actual interests of the holders of Seven Per Cent. Guaranteed Stock and represent no other interest whatever. The said Committee has not been organized and is not acting at the instance of, nor is it directly or indirectly allied with or influenced, nor is it acting under the influence of any banking or financial group, nor any interest representing either securities of the Interborough Rapid Transit Company or any group planning or financially interested in a plan for reorganization or unification of

any of the rapid transit facilities of Greater New York. The Protective Committee of your petitioners has been organized for the sole purpose of protecting the bona fide interest of the holders of said Seven Per Cent. Guaranteed Stock as such; and one of its reasons, among others, for presenting this petition is to forestall the filing of an intervening petition by stockholders who might preempt the right in this cause to represent the said Seven Per Cent. Guaranteed Stock and may purportedly be acting in its interest, but who may on the contrary work without reference to or against its interest either through making an unfair use of their position, or through actually representing or unduly favoring or combining with interests antagonistic to the rights of the said Seven Per Cent. Guaranteed Stock.

SECOND: The primary purpose of this petition in intervention is to enable your petitioners as such Protective Committee to protect the said Seven Per Cent. Guaranteed stockholders from a threatened destruction of their rights as presently set forth, through any undertaking on the part of the defendant herein, Interborough Rapid Transit Company, to disaffirm and render inoperative a certain indenture of January 1, 1903, between the Manhattan Railway Company, hereinafter called Manhattan, as lessor, and Interborough Rapid Transit Company, hereinafter called Interborough, as lessee, whereby the Manhattan leased its properties to Interborough for a period of 999 years from November 1, 1875. Your petitioners believe and state upon the basis of facts which will be presently set forth that the holders of said Seven Per Cent. Guaranteed Stock constitute the only group which has an unqualified interest in maintaining and protecting the integrity and continuance of the said Manhattan lease; that there is no adequate way by which your petitioners can be informed of proceedings in this cause or can adequately protect their said rights, unless they be permitted to inter-

vene in this cause as parties in order that they may have proper notice and opportunity under all circumstances to protect the said stock from disaffirmance of said lease and a destruction of their legal and equitable rights thereunder.

THIRD: That under the said 999-year lease by Manhattan to Interborough of January 1, 1903, which said lease your petitioners will ask leave to introduce as Exhibit "2" with this petition, unless the same has been or is to be by the Court's order otherwise introduced into the record of this cause, the cash rental to be annually paid to the Manhattan was the sum of Ten Thousand Dollars ($10,000) only, which said sum constituted about one-one-hundredth of one per cent. of the capital cost of the Manhattan properties; that under the said "lease" the Interborough undertook, in addition to the payment of said cash rental, under article ninth thereof, to maintain the properties and to keep them insured and to deliver them at the termination of the "lease" in as good condition as received, or in equivalent condition or value; and in article eleventh to pay and discharge as rental under the said "lease" any and all taxes, assessments, license fees, etc.; under article sixth, which will be presently set forth at length, to pay as rental to the owners of the six hundred thousand (600,000) shares of stock of Manhattan after January 1, 1906, an amount annually equal to seven per cent. (7%) upon the par value of each share, which said par value was and is One Hundred Dollars ($100); and under article seventh to pay as rentals under said "lease" the interest upon all bonds then outstanding against the Manhattan properties.

That under the terms of the said "lease" the Manhattan Railway Company was and is not a real party in interest, excepting to a negligible extent. The complete and entire consideration which Interborough was to pay in the way of rental and is now obligated to pay in the way of rental

is not to the Manhattan Railway Company, but that the true parties in interest under the said "lease" so long as it remains operative, are and continue to be, excepting as will presently be shown, the holders of the capital stock of Manhattan to whom, under the terms of the said "lease," the actual rental was to be and is now being paid by Interborough; that the function of Manhattan under said "lease" is not the function of a corporation owning and operating, or receiving consideration for use of, its properties, but is the mere function of an empty shell for continuing its own legal existence against a possible termination of the "lease" and a safeguarding of its reversionary rights in case of such termination, and that as will be now set forth in the following paragraphs of this petition, the rights of your petitioners to receive full payment of seven per cent. on their said Guaranteed Stock is not a derivative right through the Manhattan Railway Company, but is a contract right according to the terms of the said "lease," and according to the interpretation placed thereon by the Courts of the State of New York; that your petitioners' prayer for leave to intervene in these proceedings, claiming an interest in the litigation as a party therein under the terms of Equity Rule No. 37, is for the purpose of enabling your petitioners on behalf of said Seven Per Cent. Guaranteed Stock to assert not the rights in equity of the Manhattan Railway Company under said "lease," but to assert their own direct right against the Interborough and its receivers under said lease.

FOURTH: 1. That under said Manhattan-Interborough "lease" in article seventh, Interborough assumed and covenanted to pay, as rent, the interest (1) on all then outstanding debenture bonds of the New York Elevated Railroad Company then merged with Manhattan, amounting to One Million Dollars ($1,000,000); (2) on the first mortgage bonds of Metropolitan Elevated Railroad Company then merged with Manhattan of Ten Million Eight Hun-

dred and Eighteen Thousand Dollars ($10,818,000); (3) on the Consolidated Mortgage Four Per Cent. Bonds of Manhattan of which there were then outstanding bonds in principal amount of Twenty-eight Million Sixty-five Thousand Dollars ($28,065,000); (4) on all bonds which might thereafter be issued by Manhattan in extension or substitution of, or for the purpose of retiring any of said outstanding bonds; (5) on all bonds of Manhattan which might thereafter be issued under the said Consolidated Mortgage, and (6) on all bonds of Manhattan which might thereafter be issued. And the Interborough further covenanted to keep Manhattan "safe and harmless at all times from all claims and demands against it for interest arising from or under the said bonds or any of them" and covenanted further that "payments of any of such interest by the lessee (Interborough) to the Bondholders of the lessor (Manhattan) shall constitute payment of rent, in compliance with the foregoing covenants to pay the same to the lessor."

2. That there are now outstanding against Manhattan's properties mortgage obligations of Manhattan aggregating in amount, as your petitioners are informed and believe, about $45,206,000, said obligations consisting of $40,683,000 in principal amount of Consolidated Mortgage Four Per Cent. Bonds, and $4,523,000 in principal amount of Second Mortgage Four Per Cent. Bonds; that the properties of Manhattan represent, as your petitioners are informed and believe, an actual value safely in excess of the principal amount of funded indebtedness of Manhattan, so that in case of a cancellation or disaffirmance of the said "lease," the said outstanding mortgage debt would, in any event, as your petitioners are informed and believe, be adequately secured; that the holders of bonds under said mortgages have, therefore, as your petitioners believe, only a secondary interest in the maintenance of the said "lease," whereas your petitioners are wholly dependent for the

recognition of any claim whatsoever against the Interborough or its receivers, of their contractual claim for the said Seven Per Cent. dividend upon their stock, upon the continuance and integrity of the said indenture of "lease" of January 1, 1903.

3. That a certain Protective Committee consisting of Van Santvoord Merle-Smith and others acting as a Protective Committee in behalf of the Manhattan's said Consolidated Mortgage Four Per Cent. Bonds, presented to this Court on September 6, 1932, in this cause, their petition for intervention, and that this Court thereupon, without any consent by the parties then in the proceeding having been recorded in this cause, entered an order permitting said Protective Committee to intervene and to be made a party in this cause; that the said petition of said Protective Committee is hereby referred to and may be treated as an exhibit hereto; that it does not show why, if at all, the rights of the said petitioners and of those whom they represent should not be represented in this proceeding by the Trustee under said mortgage to which, as your petitioners are informed and believe, the interest has been regularly paid by the Interborough, according to the terms of said "lease" and by it distributed to the holders of bonds under said mortgage.

FIFTH: 1. That in the said Manhattan-Interborough "lease" it was provided as follows:

> "ARTICLE SIXTH: The Lessee hereby leases and hires from the Lessor the said railroad and railroads, franchises, rights, privileges, easements, real estate and property, hereinbefore mentioned, described and demised, for and during said term of nine hundred and ninety-nine years aforesaid, and upon the terms and conditions in this lease expressed, and the Lessee hereby covenants and agrees to pay to the Lessor and hereby guarantees to each

owner of record of shares of capital stock of the Lessor, dividends, as rent, as hereinafter provided, for the term of two years and nine months from the 31st day of March, 1903. The Lessor hereby covenants and agrees, that prior to the date of payment of each of the instalments of rent provided for in this article, it will declare a dividend equal to such instalment, payable upon the date of payment of such instalment, and after or simultaneously with such declaration of dividend, will close its transfer books of stock for a reasonable time prior to such
935 date of payment, and that such dividend shall be payable to the owner of record of its stock, who shall be such, on the date of closing of its transfer books aforesaid. The said dividend rentals payable to all such owners of record for each of the first two years and the remaining nine months comprised in said two years and nine months shall be an amount equal in the aggregate to the net earnings of the Lessor, for each of said three periods respectively, but shall not exceed seven per centum (7%) per annum upon the outstanding capital stock of the Lessor; and shall be not less than six per centum (6%) per annum upon such stock; said net earnings shall, among other things, include all interest earned by the Lessor, and shall be ascer-
936 tained by the system of accounting heretofore employed by the Lessor, and by deducting from the gross earnings, among other things, operating expenses, taxes accrued and proportionately chargeable to the period aforesaid, interest upon the bonds described or mentioned in ARTICLE SEVENTH of this Lease; repairs, replacements, expenses of litigation and all judgments recovered, except judgments recovered by owners or parties otherwise interested in property abutting upon the lines of railroad of the Lessor, for damages to said abutting property,

or the rental value thereof, arising from the construction, maintenance or operation of the said railroads and their interference with easements of light, air and access, and the expenses of the Lessor in litigations connected therewith.

Proper books of account according to the system of accounting heretofore employed by the Lessor shall be kept by the Lessee until January first, 1906, showing the gross earnings, and an itemized account of the proper and reasonable charges against the same, which shall at all times be open to the inspection of the officers and agents of the Lessor.

No reduction of the guaranteed annual dividend rental or in the term of years of this lease shall be made without the unanimous consent of the shareholders of record of the Lessor; provided, however, that nothing herein contained shall otherwise limit the lawful powers of the Board of Directors and shareholders of the Lessor to deal with the subject-matter of this lease and its provisions.

From and after the expiration of said two years and nine months, and from January first, 1906, the Lessee hereby covenants and agrees to pay to the Lessor, and guarantees to each owner of record of the shares of capital stock of the Lessor, as rent, an annual dividend of seven per centum (7%) on his holding of the capital stock of the Lessor.

The Lessee hereby covenants and agrees, that it will each and every year during the term hereby granted, beginning with the first day of April, 1903, pay to the Lessor as rent for the demised property, and hereby guarantees to the respective owners of record of the shares of the Lessor, the said annual dividends free of all charges, in quarter-yearly payments on the first days of January, April, July and October in each year, which after Janu-

ary 1st, 1906, shall be equal quarterly payments; the first of such payments to be made on the first day of July, 1903; and the Lessee will from time to time execute in proper form a guarantee to the above effect printed or engraved upon the certificates of stock of the Lessor; and as such stock certificates are surrendered for cancellation and issuance of new certificates in place thereof, will from time to time, upon request of the holder renew such guarantee upon all such new certificates.

The form of such Guarantee shall be as follows:

941 'Dividends amounting to six per cent. per annum and an additional amount, if earned, not exceeding one per cent. per annum, until January first, 1906, and after that date, dividends amounting to seven (7) per cent. per annum, upon the par value of the outstanding capital stock of the Manhattan Railway Company are guaranteed, and will be paid by the undersigned, in accordance with the terms and provisions of a certain Indenture made between the Manhattan Railway Company and the undersigned, dated the first day of January, 1903.

INTERBOROUGH RAPID TRANSIT COMPANY,
By

942 Treasurer.'

Payment of dividends as above provided by the Lessee to the stockholders of the Lessor shall constitute payment of rent, in compliance with the foregoing covenants to pay the same to the Lessor."

2. That pursuant to the undertaking in said article sixth hereinabove set forth the obligation of Interborough to the holders of such Seven Per Cent. Guaranteed Stock, is now so evidenced upon the face of each and every certificate of Seven Per Cent. Guaranteed Stock now held by

any of your petitioners or other holders thereof who have deposited the same under the said Protective Agreement of August 26, 1932.

SIXTH: 1. That the obligation of Interborough as set forth in said article sixth of said Manhattan-Interborough "lease" of January 1, 1903, and as set forth further in the said recital upon the face of each stock certificate, of Interborough's direct undertaking to each stockholder of Manhattan stock, originally applied to 600,000 shares of stock of the Manhattan Railway Company; that as to 556,490 shares of such stock, now known as "Manhattan Railway Modified Stock" the rights of holders have come 94
to be modified by direct contract between holders thereof and the Interborough; that said modification was effected in the years 1922 and 1923 under a certain Plan of Readjustment dated May 1, 1922, and amendments thereof, under which said Plan of Readjustment the said holders of said 556,490 shares of Seven Per Cent. Stock surrendered their direct rights against the Interborough under said "lease" to receive an annual payment of $7.00 per share, and accepted in lieu of such right the obligation of Interborough to pay to them certain amounts in dividends, but only if earned either by the combined properties of Manhattan and Interborough or through the operation alone of Manhattan by Interborough, or by Interborough alone.

945

2. That said holders of said 556,490 shares of Manhattan "modified stock," having thus surrendered all of their direct rights against Interborough under said "lease" have, as your petitioners believe, no real or genuine primary interest in maintaining the integrity or continued existence of the said "lease," and, as your petitioners believe, may well find it to the interest of the "modified stock" that the "lease" be disaffirmed and all rights thereunder destroyed so that the Manhattan prop-

erties may revert to the Manhattan Railway Company, and be operated by it for the vastly preponderant benefit of the "modified stock" which represents more than ninety per cent. of the "equity" in the Manhattan properties; that such probability of such preference on the part of the holders of "modified stock" for the disaffirmance and repudiation of the said "lease" is further augmented by the fact that whereas Interborough is at present restricted by law, as your petitioners believe and state, to a five-cent fare, the Manhattan is subject to no such restriction; and if said Manhattan-Interborough lease were abrogated,
947 Manhattan might come to operate its properties upon a more remunerative fare than five cents.

3. That for the foregoing reasons the "modified stock" would, prima facie in law, be able to dominate the policy which would be followed by Manhattan or its Receiver with reference to the disaffirmance or repudiation of said "lease," and their interests would probably move them to favor such disaffirmance and repudiation, an interest wholly antagonistic to the interest of your petitioners.

4. That after said plan of readjustment had been adopted modifying the rights of such stockholders as had assented thereto as aforesaid, the defendant Interborough undertook to refuse payment of the seven per cent. dividend to the stockholders of Manhattan who had not as-
948 sented to said plan, and who are herein referred to as Seven Per Cent. Guaranteed stockholders, upon the ground that the said indenture of lease of January 1, 1903, had been changed by the consummation of said plan; that under the terms of said "lease" it is provided in Article Sixth thereof, as hereinabove recited in paragraph "Fifth" of this petition that "no reduction of the guaranteed annual dividend rental or in the terms of years of this lease shall be made without the unanimous consent of the shareholders of record of the Lessor" (Manhattan); that in the case of *Peabody* v. *Interborough Rapid*

Transit Company, which was a suit by a holder of Manhattan Seven Per Cent. Guaranteed Stock directly against Interborough, it was held by the Supreme Court of New York County, in a decision reported in 209 New York Supplement, page 376, that the said original "lease" and the promise of the Interborough therein to pay to the holders of Seven Per cent. Guaranteed Stock, the sum of seven per cent. thereon annually continued in full force and effect; that said decision by the Supreme Court of New York County was thereafter affirmed by the Appellate Division, First Department of the said Supreme Court of the State of New York, by a majority of said Court in an opinion delivered by Presiding Justice Clarke, as reported in 209 New York Supplement, page 380, and that upon appeal to the Court of Appeals of the State of New York from the said decision of the said Appellate Division, the said decision of the Appellate Division was affirmed by the unanimous opinion of the Court consisting of Chief Justice Hiscock and Justices Cardozo, Pound, McLoughlin, Crane, Andrews and Lehman, as reported in 240 New York Reports, page 708.

5. That from the facts stated in the foregoing paragraphs it is certain as your petitioners believe and state that there is no party at present in this cause which has any real or primary interest to protect and safeguard the integrity and continuance of the said indenture of "lease" of January 1, 1903; that the Manhattan itself has no such primary interest, since it receives no real benefit therefrom; that the holders of bonds of Manhattan have no such real or primary interest since their obligations are, on information and belief, adequately secured by the Manhattan properties; and that the vastly predominant stockholder interest in Manhattan has no such interest in the protection of said "lease" but, on the contrary, upon information and belief, is probably antagonistic to the continuance thereof.

952 SEVENTH: That the courts of the State of New York have interpreted and construed the obligation of Interborough to holders of the Seven Per Cent. Guaranteed Stock of Manhattan as being a direct obligation from Interborough to each and all of the holders of such stock, an obligation upon which such holder may sue and recover against Interborough without impleading Manhattan; that such interpretation and construction of said obligation were established in the case of *Bowers v. Interborough Rapid Transit Company,* 201 New York Supplement, page 198, Supreme Court, Special Term (1923), in
953 which the Court delivered in part the following opinion, at page 204 of said volume:

> "For evident reasons the defendant here undertook an obligation, termed a guaranty, probably so termed for the appeal made by that word to the lay stockholder or investor, which is not a mere collateral engagement relating to dividends, but is an original obligation running to the persons holding the stock of the lessor. As such it is manifestly a promise which can be enforced by the persons to whom it runs in form as well as substance. See Pennsylvania Steel Co. v. New York City Railway, supra, 198 Fed. 749, 750, 117 C. C. A. 503, note. We can adopt the language found at page
954 27 of 112 N. Y. at page 496 of 19 N. E. (2 L. R. A. 648), of the report in the Beveridge Case, referred to above, and say that here the 'promise clearly was for the third person's benefit, and made with that distinct intention.'
>
> Indeed, defendant makes no argument that such an obligation running directly to the stockholders could not be availed of directly by them. It is intended to be for the benefit of the stockholders and to run to them. The agreement we have here is sufficient evidence in itself that the parties intended the 'guaranty' to be such that the stockholders could sue on it."

That the said decision was affirmed by the Appellate Division, First Department of said Supreme Court, by unanimous concurrence of the Justices sitting, as reported in 202 New York Supplement, page 917.

EIGHTH: 1. That the outstanding and crucial question which, as your petitioners are informed and believe, will arise in this cause is the question whether or not the receivers of the Interborough will undertake to disaffirm and repudiate the said Manhattan-Interborough indenture of lease of January 1, 1903; that the said lease, although highly profitable to Interborough through a course of more than eighteen years after execution thereof, has for various reasons come to be less profitable to Interborough and is at the present time claimed to be both inconvenient and unprofitable to Interborough; that during the past several years prior to this time there has been continual insistence by various financial interests associated with Interborough or with the ownership of securities of Interborough, that the said "lease" should be canceled and set at naught; that such insistence was signaled in the first instance by Interborough's attempt, as just set forth in Seventh hereof, to evade obligation to the holders of Seven Per Cent. Guaranteed Stock, which said attempt was, as there set forth, overruled by the courts of the State of New York; that since that time such insistence that Interborough be relieved of the obligations under said lease has been expressed in the public press by certain financial interests and by various publicists whose financial affiliations were not apparent, and that such public pressure exerted by such interests and from such sources for the abrogation of said lease has continued up to and including the present time; that the bill of complaint in this cause, in paragraph fifteenth thereof, recites, among other things, the obligations of Interborough under said lease as being obligations which Interborough is without financial resources to meet in full.

2. That in its answer in this cause, sworn to by the President of Interborough on August 25, 1932, consenting to the appointment of a receiver for Interborough, it admitted all of the allegations in said bill of complaint; that in Manhattan Railway Company's petition herein of September 2, 1932, for receivership of Manhattan, the petitioner in paragraph second of said petition referred to said indenture of lease of January 1, 1903, referred to the inability of Interborough to make rental payments to holders of Manhattan bonds and of Manhattan Guaranteed Seven Per Cent. Stock, as so pleaded in said bill of complaint, and said answer in this cause, as constituting, among other things, grounds for the appointment by this Court of a receiver or receivers for Manhattan.

3. That as your petitioners are informed and believe, the said crucial question as to the power of Interborough or of its receivers to disaffirm or repudiate the said indenture of lease of January 1, 1903, is a question which may at any time in this proceeding be directly or indirectly raised in connection with the impending maturity on October first of the obligation of Interborough under said lease to make the quarterly payment of $1.75 per share to each and every holder of said Guaranteed Stock, an amount aggregating $76,142.50; that the payment of said guaranteed rental to the holders of the Seven Per Cent. Guaranteed Stock is an operating item and an operating charge against the properties and assets of Interborough, whether such property and assets be under its own control, or under the control of its receivers in this cause; that for several years past the said obligation for payment of "dividend rentals" to holders of Seven Per Cent. Guaranteed Stock of Manhattan has been carried upon the books and accounts of Interborough as such operating charge upon the same basis as Interborough's obligation to pay taxes upon its own or Manhattan properties; that the obligation of the receivers of Interborough in this cause

to pay said guaranteed rental to holders of such Seven Per Cent. Guaranteed Stock constitutes a right and claim by your petitioners and holders of such stock represented by them as such Protective Committee, which claim is prior to the claim or claims of the holders of any of the outstanding obligations of Interborough, whether secured or unsecured, and prior to the rights of any stockholders of Interborough; that on information and belief the receivers of Interborough will on October 1, 1932, have in their hands sufficient funds to pay as such operating item to the holders of Seven Per Cent. Guaranteed Stock of Manhattan the said aggregate sum of $76,142.50 to which they are entitled both in law and in equity in such priority to any of the classes of obligees or of stockholders of Interborough just hereinbefore mentioned; that there are in this cause as parties, as hereinbefore set forth, no persons or interest whatsoever which from motives of real interest would oppose orders relating to non-payment by Interborough receivers of said rental dividends and which may be submitted to this Court for entry prior to October first and which might destroy or impair or prejudice irreparably the rights of your petitioners and of the other holders of such Seven Per Cent. Guaranteed Stock; that as hereinabove set forth, the Manhattan Railway Company has no such interest; the holders of over ninety per cent. of the stock of Manhattan have an interest which would presumably favor such destruction, impairment or prejudice to your petitioner's rights; that the holders of Manhattan bonds, as set forth above, are so secured that the obligations which they hold, as hereinabove stated, are adequately protected by the mortgages securing such obligations, and therefore have only a secondary interest in safeguarding the integrity and continuance of said indenture of lease of January 1, 1903; that since the obligation of Interborough to the Seven Per Cent. Guaranteed Stock is an obli-

gation prior to the interests of all Interborough obligees or stockholders, there would be as your petitioners believe and state, a concerted attack by various major interests now represented by parties to this cause upon the rights of your petitioners, which attack would not be adequately, if at all, met by any parties with a real interest therein; and that the interests of the holders of the Seven Per Cent. Guaranteed Stock under the said indenture of January 1, 1903, cannot, as your petitioners believe and state, receive adequate or proper protection unless your petitioners, as such Protective Committee, are allowed by
965 order of this Court to become parties to this proceeding by an order to be entered at the earliest possible time consistent with the procedure of this Court, so as to enable them to present to this Court the necessary facts for it to consider in connection with any such proposed order.

NINTH: That your petitioners are praying for an order of this Court allowing your petitioners, as such Protective Committee, to intervene as a party-defendant in this proceeding to assert their rights, as hereinabove set forth, strictly in subordination to the main proceeding in this cause, and would ask either that this petition be treated as a cross-petition against defendant, Interborough Rapid Transit Company, or, that at the proper time after such order allowing intervention shall have been entered herein,
966 your petitioners be permitted to file a separate cross-petition asserting such rights also in subordination to this proceeding.

WHEREFORE, your petitioners, as prayed by them in their original petition for intervention in this cause, dated September 8, 1932, continue to pray that an order be entered herein permitting your petitioners as the Protective Committee for Manhattan Railway Company Seven Per Cent.

Guaranteed Stock to intervene as a party-defendant in this cause, and for such other and further relief as to this Court may seem proper.

Dated, September 12, 1932.

HAROLD PALMER,
NORMAN JOHNSON,
STANLEY R. LATSHAW,
HAROLD SWAIN,
JOHN W. APPEL, JUNIOR,
as the Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company,
by HAROLD PALMER,
Chairman.
NORMAN JOHNSON,
Secretary.

Doc. 32

Notice of Filing Amended and Substituted Petition for Intervention on Behalf of Harold Palmer and Others as Protective Committee.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

71

Sirs:

You and each of you will PLEASE TAKE NOTICE that as solicitors for Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, acting as the Protective Committee for the Seven Per Cent. Guaranteed Stock of Manhattan Railway Company, we have filed in the office of the Clerk of this Court in the above-entitled cause their amended and substituted petition for intervention (and cross-petition), dated September 12, 1932, copy of which is hereto attached and herewith served upon you and each of you.

72

Dated, New York, N. Y., September 14, 1932.

Yours, etc.,

MARSHALL & WEHLE,
Solicitors for Petitioners,
No. 50 Broadway,
New York, N. Y.

To:

MESSRS. CHADBOURNE, STANCHFIELD & LEVY, Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., Temporary Receivers of Interborough Rapid Transit Company, 25 Broadway, New York, N. Y.

MESSRS. HUGHES, SCHURMAN & DWIGHT, Solicitors for William Roberts, Temporary Receiver of Manhattan Railway Company, 100 Broadway, New York, N. Y.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WINIFRED SINGER, being duly sworn, deposes and says that she is over the age of twenty-one years; that on the 14th day of September, 1932, in the City of New York, Borough of Manhattan, in said County and State, she served the foregoing Notice of Filing upon the following attorneys, namely:

(1) Messrs. Chadbourne, Stanchfield & Levy, Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company, at 25 Broadway, in said City, and (2) Messrs. Hughes, Schurman & Dwight, Solicitors for William Roberts, Temporary Receiver of Manhattan Railway Company, at 100 Broadway, in said City, by delivering to and leaving personally with each of said firms of solicitors a true copy thereof.

Deponent further says that she knew the firms so served as aforesaid to be the firms mentioned and described in said Notice of Filing as such solicitors.

WINIFRED SINGER.

Sworn to before me this
14th day of September, 1932.

N. V. CAMPBELL,
Notary Public,
Kings Co. No. 661, Reg. No. 3299.
Certificate filed in N. Y. Co. No. 579, Reg. No. 3C280.

Petition for Intervention by Elon S. Hobbs.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of ELON S. HOBBS, individually, as owner and as solicitor for other owners of certain stock, bonds and notes of the Interborough Rapid Transit Company and of stock in the Manhattan Railway Company, on their behalf and on behalf of all other owners of the stock, bonds or notes of said corporations, and who desire to join in the petition, respectfully shows:

FIRST: That on or about August 25, 1932, The American Brake Shoe and Foundry Company, the plaintiff herein, filed in this Court its Bill of Complaint against the Interborough Rapid Transit Company as a general creditor, and thereupon and on or about August 26, 1932, Victor J. Dowling and Thomas E. Murray, Jr., of the City of New York were duly appointed temporary receivers of the defendant, Interborough Rapid Transit Company, and its property in said suit.

SECOND: Your petitioner, and those he represents at this time, have not deposited, and are not at present inclined to deposit their securities with the so-called protective committees who have intervened herein.

THIRD: Your petitioner agrees with the allegations contained in the intervening petition of the Morgan Committee herein that numerous questions of vital and far-reaching importance so far as they affect the interest of the security holders of the Interborough Rapid Transit Company and of the Manhattan Railway Company will be raised in the above-entitled cause and come before this Court for its decision thereon.

FOURTH: Your petitioner alleges and believes that the most important problem to be considered in this proceeding is the question of a revision of the Interborough Rapid Transit Company's contract with the City that will produce an income sufficient to pay and take care of the operating expenses and dividend and other obligations of the Interborough Rapid Transit Company and the Manhattan Railway Company without changing in principal the 5¢ fare provision of the contract with the City as intended when said contract was made. It is a matter in which the stockholders and the City of New York as the owners of the property and every taxpayer and user of the transit lines are, or should be, profoundly interested.

FIFTH: Your petitioner and those associated with him have developed a readjustment plan which, we believe, will produce the necessary income and for which the approval of not only of the City but of those who are most insistent for a retention of the 5¢ fare can be obtained.

WHEREFORE your petitioner prays that an order be entered permitting your petitioner to intervene representing non-assenting security holders and to be heard on all

matters arising in this cause and that your petitioner be entitled to notice of all proceedings herein and that your petitioner have such other and further relief as to the Court may seem just and proper.

Dated, New York, September 21, 1932.

ELON S. HOBBS,
Petitioner.

Doc. 34

Receivers' Application No. 9—Petition of Receivers for Instructions with Respect to Payments Payable October 1, 1932, and Thereafter, Under the Manhattan Lease; Also that Guaranty Trust Company of New York, Trustee, Be Made a Party.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

98(

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, upon information and belief, respectfully shows to the Court as follows:

987

1. Under date of January 1, 1903, the Manhattan Railway Company (hereinafter referred to as "Manhattan") entered into a lease with the defendant herein (hereinafter referred to as "Interborough") pursuant to which Manhattan leased all of its railroads and other property for a term of 999 years from November 1, 1875, or "so long as the Lessee and its successors shall continue to exist as a corporation and be capable of exercising all the functions herein stipulated on its behalf." A copy of said lease, marked Exhibit 1, is herewith submitted and made

part hereof with the same force as though herein set forth at length.

2. The system of railroads covered by said lease consists of the elevated railroads running along the following routes:

Ninth Avenue Line:

From the northerly terminus of Eighth Avenue near the Harlem River; thence through Eighth Avenue to 110th Street; thence through 110th Street and private property to Columbus Avenue; thence through Columbus and Ninth Avenues to Gansevoort Street; thence through Greenwich Street to South Ferry.

Third Avenue Line:

Beginning at the Battery, through Pearl Street, Hanover and Franklin Squares, New Bowery, Chatham Square, Bowery, and Third Avenue to 129th Street and Third Avenue; thence through 129th Street to Second Avenue; thence across the Harlem River and through private right of way and intersecting streets to Third Avenue, near 145th Street; thence through Third Avenue to Pelham Avenue; thence through private right of way to a point opposite 198th Street.

From the intersection of Park Row and Brooklyn Bridge through Park Row to Chatham Square.

Second Avenue Line:

From the intersection of the Bowery and Division Street, through Division Street and Allen Street to First Avenue, 23rd Street, and Second Avenue to the Harlem River.

Sixth Avenue Line:

From the intersection of Morris Street and Trinity Place, through Trinity Place, Church Street,

Murray Street, West Broadway and West 3rd Street to Sixth Avenue; thence through Sixth Avenue to 53rd Street, and through 53rd Street to Ninth Avenue.

3. By the terms of Articles Sixth and Seventh of the lease Interborough agreed to make the following payments annually as rent:

(a) For the period from March 31, 1903, to December 31, 1905, an amount equal to the aggregate net earnings of Manhattan, but not more than 7% per annum and not less than 6% per annum upon the outstanding stock of Manhattan; and from and after January 1, 1906, 7% per annum on such stock. Such 7% aggregated annually on the 600,000 shares of Manhattan stock outstanding the sum of.....	$4,200,000
(b) Interest upon the bonds of Manhattan, which at the present time is as follows:	
(1) With respect to $40,683,000 principal amount Consolidated Mortgage 4% Bonds.....	1,627,320
(2) With respect to $4,523,000 principal amount Second Mortgage 4% Bonds.....	180,920
(c) Cash Rental—the sum of $10,000 annually, which was by supplemental agreement dated March 15, 1913, increased to.....	35,000
Total.....	$6,043,240

4. In addition to the foregoing payments the lease provided that there should be paid by the Lessee all taxes and assessments levied or imposed against the Lessor, its stock or dividends, or its railroads or property.

5. On March 19, 1913, the Public Service Commission for the First District, with the consent of the authorities of the City, issued to Manhattan a certificate authorizing the construction of additional tracks on its Second Avenue, Third Avenue and Ninth Avenue elevated lines. This certificate was subsequently amended by certificate dated May 22, 1914, authorizing changes in tracks and station at 155th Street and Eighth Avenue. The franchise granted by this certificate was for a period of 85 years, subject to termination after ten years by the City, which was authorized to take possession of the additional tracks upon making certain payments. For a complete statement of the terms of said certificates, reference is made to a copy thereof, which is hereto attached as Exhibit 2.

6. An agreement was entered into between Interborough and Manhattan under date of March 15, 1913, under the terms of which Interborough assumed the obligation of paying the cost of constructing the plant and property defined in the certificate from the Public Service Commission and to make all rental and other payments and perform all acts and covenants required of Manhattan by the certificate. For a complete statement of the terms of said agreement, reference is made to a copy thereof, which is hereto attached as Exhibit 3.

7. On March 19, 1913, the Public Service Commission granted to Interborough a certificate authorizing the construction of four lines of railroads described as the Webster Avenue Line, the Eighth Avenue and 162nd Street Connection, the Queensborough Bridge Line, and the West Farms Subway Connection. The franchise under this certificate runs for a period of 85 years, subject to termination after ten years by the City, which is authorized to take possession of said lines upon making certain payments. For a complete statement of the terms of said certificate, reference is made to a copy thereof, which is hereto attached as Exhibit 4.

8. On March 19, 1913, there was also entered into an agreement between the City of New York and Interborough in two capacities: (1) as Lessee under Contract No. 3 (which is one of the contracts which relate to the City-owned subways), and (2) as grantee under the Interborough certificate. By this agreement trackage rights were reserved for the operation of elevated trains upon certain of the City-owned rapid transit railroads. For a complete statement of the terms of said agreement, reference is made to a copy thereof, which is hereto attached as Exhibit 5.

9. The additional tracks on the Second, Third and Ninth Avenue elevated lines, and the railroads provided for by the Interborough certificate, were constructed by the Interborough at its own expense, and operations under the certificate commenced on July 1, 1917. Interborough's investment to June 30, 1932, in said additional tracks and railroads under the 1913 certificates amounted in the aggregate, according to Interborough's books, to $44,597,257.47, divided as follows:

Manhattan third-tracking	$21,992,855.42
Manhattan power plant improvements	5,778,975.21
Elevated railroads under Interborough certificates	16,825,426.84
Total	$44,597,257.47

Said capital expenditure, together with $915,303.96 of capital moneys available in cash on June 30, 1932, was principally represented by the following amounts of Interborough securities outstanding on that date:

First Mortgage 5% Bonds	$31,132,537
Ten-Year 7% Notes	14,650,537
Ten-Year Unsecured 6% Notes	1,877,552
Total	$47,660,626

For the year ended June 30, 1932, the debt service (interest and sinking fund) on these securities amounted to $3,185,435.89. For accounting purposes Interborough has combined the revenue and expenses of the Manhattan lines with that of the lines constructed under the Interborough certificate, and such combined lines are known as the "Manhattan Division."

10. Because of the longer passenger haul involved in the operation of these lines and the increase in operating costs which followed the World War, the earning power of the Manhattan Division was so reduced that it not only yielded no profit to Interborough after July 1, 1917, but failed by a substantial margin to earn fixed charges, consisting of the rentals under the 1903 lease and debt service on Interborough bonds and notes, the proceeds of which had provided for the improvements under the Interborough and Manhattan certificates. There never were profits from its operation apportionable to the City. The following table shows the extent of these Manhattan Division losses for the first five years after operation commenced on July 1, 1917:

Year ended June 30	
1918	$ 434,649.60
1919	4,598,648.29
1920	5,271,886.24
1921	6,274,632.55
1922	5,316,497.59
Total	$21,896,314.27

11. As a result of this operation, Interborough defaulted in 1922 in payment of the rentals under the Manhattan lease, and as of July 1, 1922, there remained unpaid by it under said lease the amount of $9,000,000. To provide for the situation which then arose and for other capital requirements, the 1922 Interborough-Manhattan Readjustment Plan was adopted, one outstanding feature of which

was an agreement by holders of approximately 95% of the capital stock of Manhattan to accept in lieu of the rental of $7 upon each share of their stock, 3% of the par value for the year ending June 30, 1923, 4% for 1924, and 5% thereafter, with the further provision that this reduced rental was to be paid only if earned as provided by the Plan. A copy of the agreement dated November 1, 1922, made by Interborough with a Committee representing stockholders of Manhattan, giving effect to such Plan, is hereto attached as Exhibit 6.

12. In the five years following the adoption of the 1922 Plan the elevated actually carried 180,500,000 less passengers than was estimated in 1921, and while there was a temporary increase in 1927, since 1928 the volume has progressively and consistently declined. The following table shows approximately the passenger traffic on the Manhattan Division from 1922 to 1932 for the fiscal year in each case ending June 30:

1922	348,000,000
1923	348,000,000
1924	359,000,000
1925	352,000,000
1926	346,000,000
1927	359,000,000
1928	351,000,000
1929	348,000,000
1930	347,000,000
1931	327,000,000
1932	293,000,000

Attempts to find the cause for this situation have been fruitless of tangible result. The reasons which have been suggested for the remarkable falling off in traffic are as follows:

(1) Change in riding habits.

(2) Shift of the City population from the Borough of Manhattan.

(3) Decrease in building activity along the elevated lines.

(4) Increased use of taxicabs.

12-a. The following table shows the extent of the corporate losses of the Interborough for the ten years beginning 1922 in connection with the Manhattan Division operations. The deficits indicated are the amounts by which in each year the Interborough income from the Manhattan Division operations has failed to meet the rentals under the Manhattan lease (including the interest on the bonds of Manhattan) and the debt service of Interborough Rapid Transit bonds and notes whose proceeds were utilized for improvements under the Manhattan and Interborough certificates:

Year ended June 30

1923	$ 3,486,324.72
1924	3,816,266.63
1925	4,542,357.97
1926	4,159,394.38
1927	4,933,222.33
1928	6,111,249.65
1929	3,378,400.05
1930	3,816,480.88
1931	3,905,010.00
1932	4,396,084.00
Total for Period	$42,544,790.61
Deficits 1917-1922 (see p. 6)	21,896,314.27
Grand Total	$64,441,104.88

For the months of July and August, 1932, such deficit on the Manhattan Division aggregated $899,864.89.

12-b. The income from the operations of the Manhattan Division for the four fiscal years ending June 30, 1932, showed a deficit of income, after providing for operating expenses, taxes and current rent deductions, but without providing for the debt service of Interborough bonds and

notes, the proceeds of which were used for improvements under the Manhattan and Interborough Certificates, as follows:

1929	$ 347,375.72
1930	563,040.75
1931	769,180.72
1932	1,229,788.68
Total	$2,909,385.87

Such deficit for the two months of July and August, 1932, amounted to $363,816.70. Thus the operations from the Manhattan Division did not provide sufficient to pay in full the interest upon the Manhattan bonds during the four-year period ending June 30, 1932, and it is estimated by the executive officials of the Receivers that for the current year the deficit will be at least $2,000,000.

12-c. The executive officials of the Receivers estimate that the operations of the Manhattan Division for the three fiscal years beginning June 30, 1932, will result in the following deficits, after providing for taxes and rentals payable under the Manhattan lease, but without providing for the fixed charges on the Interborough securities whose proceeds were utilized for improvements under the Manhattan and Interborough certificates:

1933	*1934*	*1935*
$2,817,810	$2,960,810	$2,817,810

13. On May 31, 1932, there became due and payable real estate taxes and special franchise taxes on the properties of Manhattan, which real estate taxes amount to $251,311.10, and the special franchise taxes to $530,693.52. On June 22, 1932, Manhattan demanded that Interborough pay said taxes or deposit in a bank or trust company the amount thereof.

On September 15, 1932, Manhattan and its Receiver, William Roberts, notified your Receivers that the quar-

terly instalment of the Federal Income Tax of Manhattan was payable September 15, 1932, and demanded that such payment be made. Such quarterly payment amounts to approximately $8,473.

On October 1, 1932, there will become payable a semi-annual instalment of interest, amounting to $813,660, upon the outstanding $40,683,000 Consolidated Mortgage 4% Bonds of Manhattan.

On October 1, 1932, there will become payable under the aforementioned lease the quarterly rental on 43,510 shares of Manhattan stock not participating in the 1922 Readjustment Plan, which quarterly rental amounts to $76,142.50.

14. Article 21 of the Manhattan lease provides, among other things, that in case of default in payment of rentals and the same remain unpaid for ninety days after the time when they shall become due and payable, the term of the lease shall at the option of the Lessor expire and cease and determine, and the Lessor shall have the right to enter upon and take possession of the property leased. For a complete statement of the provisions of said Article, reference is made to the lease, Exhibit 1, attached hereto.

15. Under date of March 20, 1913, Interborough executed to Guaranty Trust Company of New York, as Trustee, its First and Refunding Mortgage securing a total issue of $300,000,000 of 5% Gold Bonds dated January 1, 1913, maturing January 1, 1966. Included in the property subjected to said mortgage in the above-mentioned lease executed by Manhattan to Interborough, dated January 1, 1903, and all rights of Interborough thereunder, as well as in the above-mentioned agreement dated March 15, 1913, between said companies, as well as all rights of Interborough thereunder.

There were also included in the mortgaged property all franchises, licenses and rights vested in Interborough under the above-mentioned certificate dated March 19, 1913.

granted to Interborough by the Public Service Commission for the First District, and in all railroads and property constructed or acquired pursuant thereto, and in all sums of money or other property receivable by Interborough thereunder.

There were also included in the mortgaged property all rights, interests and property of Interborough under the certificate dated March 19, 1913, granted to Manhattan by said Public Service Commission. The granting clause in said mortgage respecting said certificate reads as follows:

> "* * * (a) the leasehold interest of the Interborough Company thereunder, and all the right, title, interest, claim and demand whatsoever of the Interborough Company of, in and to said contract and the premises and property subject or to become subject thereto; (b) any and all sums of money, indemnity bonds or other security, and other property of every kind, payable or paid to, or receivable or received by, the Interborough Company or its successors, in the event of the termination by The City of New York of said contract under any of the provisions thereof; and (c) any and all sums of money, indemnity bonds or other security and other property of every kind, payable or paid to, or receivable or received by, the Interborough Company or its successors, in the event that The City of New York or its licensees shall enter into the possession of and operate the railroads or any thereof subject to the provisions of said contract."

By the terms of said mortgage Interborough covenanted to "pay the rent reserved and all other payments required to be made in, and in all other respects whatsoever will comply with all of the conditions, covenants, terms, stipulations and provisions of, the said lease to the Interborough Company made by the Manhattan Railway Company and any agreement amendatory thereof or supplemental

thereto." There was also a covenant that Interborough will comply with all of the terms and conditions set forth in the above-mentioned certificates of the Public Service Commission to Interborough and Manhattan respectively.

16. There are outstanding in the hands of the public $132,228,000 principal amount of First and Refunding Mortgage Gold Bonds, and $54,989,000 principal amount of said bonds are pledged as security for the 7% secured Gold Notes of Interborough maturing September 1, 1932. In addition there are $40,140,000 principal amount of said bonds held in the sinking fund under said Mortgage, and $6,556,000 principal amount are held in special trust for future sinking fund payments. In addition approximately $1,169,308 in cash is held by the Trustee in the sinking fund under said Mortgage.

17. Your Receivers have not had sufficient time to make as complete an investigation as may be necessary to enable them to make recommendations to the Court with respect to the action to be taken by them in connection with the foregoing matters.

WHEREFORE, in view of the premises, your petitioners respectively pray to the Court that they may receive the instructions of the Court with respect to the payment of the amounts which have heretofore become due and payable and which will on October 1, 1932, and thereafter become payable by way of rental under the lease from Manhattan; that in view of the interest of Guaranty Trust Company of New York, as Trustee under the First & Refunding Mortgage of Interborough, dated March 20, 1913, as above set forth, said Trustee be brought in as a party to this cause; that all the parties to this cause, including the intervenors and said Guaranty Trust Company of New York, as Trustee as aforesaid, be directed to answer the foregoing petition on such date as the Court may fix, and that the foregoing matters be set down for

hearing thereafter; that this Court order and direct that pending hearing and final adjudication of this Court on the matters set forth in this petition, no acts or action of the petitioners shall be deemed to constitute either an adoption or rejection of said lease or of any of the agreements hereinbefore set forth; and that the Court grant such other and further relief in the premises as to it may seem necessary and proper.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
As Receivers for Interborough Rapid
Transit Company,
Petitioners.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Receivers,
Office & P. O. Address,
25 Broadway,
Borough of Manhattan,
New York City.

WM. WALLACE, of Counsel.

Attached to the original of the foregoing application were the following documents as exhibits, each of which is printed as part of a separate volume of Receivership Record Exhibits.

EXHIBIT 1.

Manhattan Railway Company to Interborough Rapid Transit Company—LEASE—Dated January 1, 1903.

EXHIBIT 2.

Public Service Commission for the First District to Interborough Rapid Transit Company—Webster Avenue Line, Eighth Avenue and 162nd Street Connection, Queensboro Bridge Line, West Farms Subway Connection—CERTIFICATE—Dated March 19th, 1913.

EXHIBIT 2-A.

Certificate granted to the Manhattan Railway Company by the Public Service Commission for the First District, modifying Certificate dated March 19, 1913, authorizing additional tracks to elevated lines of the Company on Eighth Avenue, between 152nd and 159th Streets, and changes in the terminal facilities at and near 155th Street —Dated May 22, 1914.

EXHIBIT 3.

Manhattan Railway Company with Interborough Rapid Transit Company—AGREEMENT—Dated March 15th, 1913.

American Brake Shoe Record.
Exhibits Attached to Petition.

EXHIBIT 4.

Public Service Commission for the First District to Manhattan Railway Company—Second Avenue, Third Avenue and Ninth Avenue Additional Tracks—CERTIFICATE—Dated March 19, 1913.

EXHIBIT 4-A.

Public Service Commission for the First District to Interborough Rapid Transit Company—Certificate dated May 22nd, 1914, Modifying Terms of Certificate to Interborough Rapid Transit Company, dated March 19, 1913.

EXHIBIT 5.

The City of New York, by the Public Service Commission for the First District, with Interborough Rapid Transit Company, Lessee and Grantee—SUPPLEMENTARY AGREEMENT—Trackage Rights—Seventh Avenue-Lexington Avenue Line, White Plains Road Line and Steinway Tunnel Line—Dated March 19th, 1913.

EXHIBIT 6.

Interborough Rapid Transit Company and Alvin W. Krech, Lewis L. Clarke, Bertram Cutler, Alfred Skitt, Frederick Strauss and Thomas H. West, Jr., acting as a Committee representing Stockholders of Manhattan Railway Company—AGREEMENT—Dated November 1, 1922.

Doc. 35-A

Receivers' Application No. 7, September 21, 1932—Petition for Order Authorizing Receivers to Employ Court Reporters.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers herein of Interborough Rapid Transit Company, upon information and belief respectfully shows to this Court that from time to time there will be hearings before this Court in which testimony will be offered and arguments made by counsel and that it is desirable that such testimony and arguments be reported by competent court reporters; that the Southern District Court Reporters, 15 Park Row, New York, N. Y., have been designated as official court reporters by this Court.

WHEREFORE, your petitioners pray that an order may be made by this Court authorizing and directing the Receivers to employ as court reporters for the taking of testimony and reporting of arguments made before this Court

American Brake Shoe Record.
Receiver's Application No. 7.

in these proceedings the Southern District Court Reporters, 15 Park Row, New York, N. Y.

Dated, New York, N. Y., September 21, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers of Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Receivers.
Office and P. O. Address,
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE, of Counsel.

Doc. 35-B

Waiver and Consent.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 23, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committe constituted by and acting under the Deposit Agreement, dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes.

American Brake Shoe Record.
Waiver and Consent.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

ROOT, CLARK & BUCKNER,
Attorneys for the Committee for the Protection of the Holders of Ten-Year Six Per Cent Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

COTTON, FRANKLIN, WRIGHT & GORDON,
Attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for the Receiver of Manhattan Railway Company.

DILLS, MUECKE & SCHELKER,
Attorneys for Manhattan Railway Company.

Doc. 36

Notice of Motion for Order Respecting Sinking Fund Moneys.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

AMERICAN BRAKE SHOE & FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

Sirs:

PLEASE TAKE NOTICE that upon the petition hereto attached of Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, we shall move the Court on Monday, October 3, 1932, at 3 o'clock P. M., or as soon thereafter as counsel can be heard, in Room 439, United States Post Office Building, for an order instructing and directing said Receivers to take no action respecting the sinking fund moneys held by Guaranty Trust Company of New York as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company dated March 20, 1913, on the ground that such moneys are trust funds in the possession of said

Trustee, and for such further relief in the premises as may be just.

Dated, New York, October 1, 1932.

Yours, etc.,

CHADBOURNE, STANCHFIELD & LEVY,
Attorneys for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company,
Office & P. O. Address,
25 Broadway,
Borough of Manhattan,
New York City.

To:

MESSRS. BREED, ABBOTT & MORGAN,
Attorneys for Complainant,
15 Broad Street, New York City.

JAMES L. QUACKENBUSH, Esq.,
Attorney for Defendant,
165 Broadway, New York City.

MESSRS. DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Committee for Interborough Rapid Transit Company 10-Year Secured Convertible 7% Gold Notes due September 1, 1932, and for Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966, and for Guaranty Trust Company of New York as Trustee under said Mortgage,
15 Broad Street, New York City.

MESSRS. ROOT, CLARK & BUCKNER,
Attorneys for Committee for Interborough Rapid Transit Company 10-Year 6% Gold Notes due October 1, 1932,
31 Nassau Street, New York City.

MESSRS. DILLS, MUECKE & SCHELKER,
Attorneys for Manhattan Railway Company,
1 Pershing Square, New York City.

MESSRS. HUGHES, SCHURMAN & DWIGHT,
Attorneys for William Roberts, Receiver of Manhattan Railway Company,
100 Broadway, New York City.

MESSRS. COTTON, FRANKLIN, WRIGHT & GORDON,
Attorneys for Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Gold Bonds,
63 Wall Street, New York City.

MESSRS. DAVIES, AUERBACH & CORNELL,
Attorneys for Central Hanover Bank & Trust Company as Trustee under Consolidated Mortgage of Manhattan Railway Company,
1 Wall Street, New York City.

MESSRS. MILBANK, TWEED, HOPE & WEBB,
Attorneys for Chase National Bank of the City of New York as Trustee under Second Mortgage of Manhattan Railway Company,
15 Broad Street, New York City.

MESSRS. MARSHALL & WEHLE,
Attorneys for Protective Committee for 7% Guaranteed Stock of Manhattan Railway Company,
50 Broadway, New York City.

Doc. 36b

Receivers' Application No. 8—Application of Receivers for Instructions with Reference to Certain Sinking Fund Moneys Now Held by Guaranty Trust Company of New York, as Trustee under First and Refunding Mortgage of Interborough Rapid Transit Company, Dated March 20, 1913.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers of defendant, Interborough Rapid Transit Company, upon information and belief, respectfully shows to the Court as follows:

1. Guaranty Trust Company of New York is the existing and acting Trustee under the First and Refunding Mortgage of the defendant, Interborough Rapid Transit

Company, to Guaranty Trust Company of New York, as Trustee, dated March 20, 1913, created to secure an authorized issue of $300,000,000 principal amount of First and Refunding Mortgage 5% Gold Bonds (hereinafter called the "Bonds") of the defendant, Interborough Rapid Transit Company. According to the records of the defendant, Interborough Rapid Transit Company, there are now issued and outstanding (a) in the hands of the public bonds secured by said mortgage in excess of $132,000,000 principal amount, and (b) additional bonds in excess of $54,000,000 principal amount pledged to secure an issue of Ten-Year Secured Convertible 7% Gold Notes of the defendant Company. Said First and Refunding Mortgage purports to be secured by a lien on the property of the defendant Company therein described, including property described in Granting Clause XIII of the First and Refunding Mortgage, which reads as follows:

> "XIII. All property of every name and nature, from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof, pledged, assigned or transferred by the Interborough Company, or with its written consent by anyone in its behalf, to the Trustee, which hereby is authorized to receive any property at any and all times, as and for additional security, and also, when and as hereinafter provided, as substituted security, for the payment of the bonds issued or to be issued hereunder, and to hold and apply any and all such property according to the terms hereof."

Your Receivers, contemporaneously with the filing of this application, have filed with the Clerk of the United States District Court for the Southern District of New York in the above entitled cause, a copy of said First and Refunding Mortgage as Exhibit A in said cause, to which Exhibit A reference is hereby made for a more particular descrip-

tion of the terms and provisions of said First and Refunding Mortgage and the nature and extent of the security purported to be created hereby.

2. Said Bonds and said First and Refunding Mortgage contain provisions for the retirement and/or redemption of Bonds through operation of the Sinking Fund. The provision in the Bonds with respect to the Sinking Fund is as follows:

> "This bond may be redeemed by payment of the principal of this bond together with a premium of ten per centum (10%) of such principal, either through the operation of the sinking fund in the said mortgage provided for, or, at the option of the Company, upon any interest day, provided in either case that notice thereof shall have been published in two newspapers in the Borough of Manhattan, City of New York, once a week for at least four weeks, all as provided in said mortgage; accrued interest to the date of redemption being payable upon presentation and surrender of the coupon therefor."

The provisions of the First and Refunding Mortgage with respect to the payment and application of the Sinking Fund are found in Article Four of the First and Refunding Mortgage, and read as follows:

"ARTICLE FOUR.

Section 1. The Trustee and the successor of the Trustee from time to time shall be, and hereby is, appointed custodian of the Sinking Fund hereunder. The Trustee agrees to keep true and accurate accounts of all transactions of the Sinking Fund, to furnish information concerning the same to the Interborough Company on its request, and to afford

to the Public Service Commission access to all accounts, records, vouchers, and memoranda having to do with such Sinking Fund.

Sec. 2. On the first day of July, 1918, and on the first day of January and the first day of July in each calendar year thereafter, the Interborough Company shall pay and deliver to the Trustee a sum equal to one-half of one per centum of the face amount of all bonds issued and outstanding hereunder (including bonds held in the Sinking Fund), which sum may be paid either in cash or in bonds (bearing all unmatured coupons) of this issue or partly in cash and partly in bonds, such bonds being estimated at their face value of principal; provided, however, that in every case there shall be paid in cash a sum equal to one-half of one per centum of the face amount of all outstanding bonds (including bonds held in the Sinking Fund) issued hereunder for the purpose of Additions, as defined in the aforesaid Contract No. 3 and as set forth in clause (e) of Part B of Section 4 of Article One of this indenture.

If and when, under the provisions of Section 4 of Article One of this indenture, bonds hereby secured shall be issued to provide for the construction or for the equipment or appurtenances of railroads, pursuant to any contract or lease or agreement hereafter made with the City of New York, or pursuant to any certificate hereafter granted by the Public Service Commission, entitling the City of New York, or its licensee or any other corporation or person to take possession of all or of any of the railroads subject thereto, then in respect of such bonds, in addition to the Sinking Fund payments at the rate aforesaid, there shall be paid semi-annually into the Sinking Fund such amount as may be computed to be necessary to acquire from time to

time for the Sinking Fund so many of such bonds that at no time shall the aggregate redemption price of the remainder of such bonds outstanding exceed the amount of the moneys payable by the City of New York, or its licensee or other corporation or person, if at such time it or they were to take possession of the property as above mentioned; it being intended that unless the property acquired with such bonds, or their proceeds, shall remain subject to the lien of this indenture until all of the bonds hereby secured shall be redeemed or be paid, the provisions of this Article shall secure the prompt redemption of such bonds if and when the Interborough Company shall cease to retain the possession of such property.

In case the railroads, for the construction of which provision is made in the aforesaid Contract No. 3 between the City of New York and the Interborough Company, shall be opened for initial operation (as specified in said Contract No. 3) prior to the year 1918, said Sinking Fund payments, at the rate aforesaid, shall begin on the interest date next succeeding such initial operation, and continue semi-yearly thereafter as aforesaid—the amount of the first of such payments so payable after such initial operation to be such proportion of the semi-yearly installment of one-half of one per cent. as the number of days on which such railroads are operated during such half year in which such initial operation shall begin, bears to the total number of days in such half year.

At its option, the Interborough Company at any time and from time to time may pay as aforesaid additional sums into the Sinking Fund.

Any such cash so received, and also any other moneys paid into the Sinking Fund pursuant to any provision of this indenture, shall be held and

be applied by the Sinking Fund Trustee as in this Section provided, that is to say:

(a) If within twenty days after the receipt by the Trustee of any such cash sinking fund payment, the Interborough Company shall be authorized and able to sell and to deliver bonds authorized to be issued under this indenture (and not theretofore sold by it to others), the Interborough Company may, and if required by the Public Service Commission it shall, tender such bonds to the Trustee for purchase for the Sinking Fund, and thereupon the Trustee shall use the moneys then in the Sinking Fund (so far as the same are sufficient) for the purchase of such bonds for the Sinking Fund, at the price at which the Interborough Company is authorized to issue such bonds; provided, however, that such price be not in excess of the average market price of such bonds in the New York Stock Exchange (if any) for the previous calendar month, as such market price shall be determined by the Trustee. To accomplish the purpose of this provision, the Interborough Company shall at such time make its sinking-fund payment either in cash or in bonds at the authorized price of issue, to such amount as, with any other moneys in the Sinking Fund, shall be sufficient to enable the Trustee to acquire the bonds authorized to be tendered for the Sinking Fund as in this paragraph above provided.

If upon the expiration of any such period of twenty days, there shall remain in the Sinking Fund a balance of moneys after deducting any amounts used or required for the purchase of bonds as before in this section provided, the Trustee shall begin publication in at least two newspapers of general circulation published in the Borough of Manhattan, City of New York, once in each week

(beginning on any day of the week) for four successive weeks, of notice that it will purchase for the Sinking Fund to the extent of the cash sinking fund in its hands, bonds secured hereby then outstanding, at the lowest price at which bonds (including interest accrued thereon), on or before the first day of April or of October, as the case may be, next ensuing after such publication, shall be offered to the Trustee, not exceeding 110 per cent. of the face value of principal thereof; and thereupon the Trustee shall apply the cash sinking fund then in its hands to the purchase of bonds (including all unpaid coupons and unmatured interest obligations) tendered to it as aforesaid, at not exceeding 110 per cent of the face value of principal thereof, giving preference in such purchases to the bonds which shall be offered at the lowest price. In case bonds shall be offered by two or more holders at the same price, to an amount in the aggregate exceeding the cash sinking fund applicable thereto acceptance of such offers shall be made by the Trustee in the order of the date of the reception by it of such offers; and if such equal offers of two or more bondholders be received by the Trustee at the same time, then each offer shall be accepted to an amount (as near as may be) which shall bear to such offer substantially the same proportion as such cash sinking fund shall bear to the aggregate of such simultaneous equal offers. All offers by bondholders, as aforesaid, shall be made subject to such acceptance of a portion thereof.

At any time during the period in which bondholders may offer bonds for the Sinking Fund as above provided, the Interborough Company itself shall have the right to tender to the Trustee for the Sinking Fund any bonds issued under this inden-

ture, and any tender of bonds by the Interborough Company shall be accepted by the Trustee in preference to any other tender of bonds by bondholders at the same price or any higher price.

(b) If, prior to the first day of May or of November, as the case may be, next ensuing after receipt of such cash, the Trustee shall not upon the terms so indicated have purchased such bonds to an amount sufficient to exhaust such moneys, then such moneys, or any unapplied portion thereof in excess of $10,000, shall be applied to the acquisition for the Sinking Fund or the interest date next ensuing of said bonds (excluding coupons and interest obligations maturing prior to and on such interest date) at the rate of 110 per cent of the face value of principal thereof, by lot as next hereinafter provided.

The Trustee shall draw by lot, referring to the serial numbers thereof, such amount of the outstanding bonds as in the opinion of the Trustee such moneys so held by the Trustee shall suffice to acquire at the rate aforesaid. If any serial number endorsed upon any registered bond without coupons of a denomination greater than $1,000, shall be designated at such drawing, such registered bond shall be surrendered to the Trustee at or after the date fixed as above provided, and thereupon coupon bonds and registered bonds without coupons, or either, for the unpaid balance, if any, of the face amount of the registered bond without coupons so surrendered, shall simultaneously with surrender be issued by the Interborough Company without charge therefor. The Trustee shall forthwith cancel the registered bond when surrendered.

After such drawing, the numbers of all bonds so designated by lot shall be published by and in the name of the Interborough Company, as directed by

the Trustee, once in each week (beginning on any day of the week) for four successive weeks, in the calendar month next preceding the date of such redemption, in two or more newspapers of general circulation published in the Borough of Manhattan, City of New York, New York, with a notice that upon surrender to the Trustee of such bond with all coupons and interest obligations subsequently maturing, the principal sum of such bond and a premium of ten per cent. of such principal, will be paid upon the next ensuing interest date.

Upon publication of such notice as aforesaid, the bonds so designated shall be payable on the date, at the place and at the rate in such notice stated. 107(

The coupon or claim for interest upon any bond drawn and called for such acquisition, maturing on or prior to the date fixed for such acquisition, shall be payable by the Interborough Company in accordance with the provisions in that respect in said bonds and coupons contained.

After such date so designated, no interest shall accrue or shall be payable upon or in respect of any bond so designated and notified, nor shall any coupon representing any such subsequently accruing interest be of any force or effect.

Payment of the sum payable for principal and premium of each coupon bond drawn for acquisition for the Sinking Fund, shall be made to the bearer of such bond upon surrender, on or after the date designated as aforesaid, of such bond and of all coupons for interest thereon maturing subsequently to the date for acquisition designated in such notice, and payment of the sum payable for principal and premium of each registered bond drawn for such acquisition shall be made to the registered holder of such bond, upon surrender thereof duly endorsed for transfer. 1077

(c) All bonds acquired by the Trustee for the Sinking Fund shall be deemed to remain alive for the purposes of the Sinking Fund, and shall not again be issued, and shall be stamped: 'Not negotiable. Held for Sinking Fund under First and Refunding Mortgage dated March 20, 1913, of Interborough Rapid Transit Company to Guaranty Trust Company of New York.' The Interborough Company shall duly pay to the Trustee the amount of all interest obligations upon all bonds acquired and held for the Sinking Fund as aforesaid, when and as such interest shall respectively become due, upon surrender and cancellation of any coupons representing such interest obligations, and the amounts so received by the Sinking Fund Trustee shall be added to the Sinking Fund and applied as provided in this Section 2."

3. Pursuant to the provisions of Section 2 of Article Four of said First and Refunding Mortgage, defendant, Interborough Rapid Transit Company, on or about July 1, 1932, and prior to the appointment of Receivers in this cause, and prior to the filing of the complaint of The American Brake Shoe and Foundry Company in this cause, paid to Guaranty Trust Company of New York, as Trustee and Custodian of the Sinking Fund, the sum of $1,169,308.24, such payment being made as and for the Sinking Fund payment required to be made by defendant, Interborough Rapid Transit Company, pursuant to the provisions of Section 2 of said Article Four. Neither the defendant, Interborough Rapid Transit Company, nor your Receivers have been authorized or have been able or are able to sell and deliver Bonds to the Trustee for purchase for the Sinking Fund as permitted by paragraph (a) of Section 2 of Article Four of said First and Refunding Mortgage, nor will said defendant, Interborough Rapid Transit Company, or your Receivers be able to sell and

deliver Bonds to said Trustee for purchase for the Sinking Fund on or prior to October 1, 1932, nor has the Public Service Commission required the tender and delibery by defendant, Interborough Rapid Transit Company, or your Receivers of Bonds to the Trustee for purchase for the Sinking Fund pursuant to the provisions of said paragraph (a), though a period of more than twenty days has elapsed since the receipt by the Trustee of the cash Sinking Fund payment above mentioned.

4. Your Receivers are advised that Guaranty Trust Company of New York, as Trustee and Sinking Fund Custodian aforesaid, has caused to be published notices in newspapers of general circulation in the Borough of Manhattan, City of New York, in accordance with the provisions of Section 2 of Article Four of said mortgage, and proposed to purchase on or prior to October 1, 1932, Bonds tendered to it for purchase, from moneys in said Sinking Fund, at the lowest prices and in an amount sufficient to exhaust the cash held by said Trustee in the Sinking Fund.

5. First and Refunding Mortgage Bonds of the defendant, Interborough Rapid Transit Company, are listed on the New York Stock Exchange, and the prices of said Bonds as quoted on said New York Stock Exchange (the Company having paid the interest on said Bonds due July 1, 1932, and not at the present time being in default with respect to any interest) are exclusive of accruals of interest from July 1, 1932, on the Bonds, so that there must be added to the quoted price the accumulated interest to date of purchase in determining the actual cost of a Bond purchased on such Exchange. Quotations are also given in figures which are equivalent to a per cent. of the principal amount of the Bond. The closing market quotation of First and Refunding Mortgage Bonds of the defendant Company on September 26, 1932, on the New York Stock Exchange was 45⅜ and the average market quotation and

price for that part of the month of September, 1932, terminating on September 26, 1932, for said Bonds was 47, the quotations for said Bonds having fluctuated for the period from September 1, 1932, to September 26, 1932, from a high of 45¾ to a low of 45¼. The quotations on said Bonds on the New York Stock Exchange since July 1, 1932, have varied from a high of 58 to a low of 34¾, with an average quotation since July 1, 1932, of 46⅜.

6. Since the appointment of your Receivers, your Receivers have had no opportunity to make an extended investigation as to the status of said First and Refunding Mortgage, the extent and nature of the lien thereof, nor as to the status of the Bonds issued thereunder, the extent of its financial requirements, nor the availability of funds to meet such requirements, nor are your Receivers able at present to determine whether or not events of default, if any, have occurred under said First and Refunding Mortgage. As soon as your Receivers have had an opportunity to make a more extended investigation with respect to the foregoing matters, your Receivers expect to apply to the Court for appropriate instructions.

7. Your Receivers have made no demand upon the Guaranty Trust Company of New York, as Trustee and Sinking Fund Custodian under said First and Refunding Mortgage, for the payment to it of the sum of $1,169,308.24 referred to in paragraph 4 of this application, your Receivers being advised by counsel that, in their opinion, the taking of any action which would prevent the application of said sum of $1,169,308.24 held in the Sinking Fund by Guaranty Trust Company of New York on or prior to October 1, 1932, to the purchase of Bonds tendered to it would in all probability constitute a default under the First and Refunding Mortgage of the defendant Company.

WHEREFORE, your Receivers pray the instructions of this Court with respect to making a demand on Guaranty Trust Company of New York for the payment to your Receivers of the moneys now held by the said Guaranty Trust Company of New York, as Trustee and Custodian of the Sinking Fund, and for instructions as to whether or not your Receivers should take any other action with respect to said Sinking Fund moneys so held by Guaranty Trust Company of New York, and your petitioners further pray that they may receive the instructions of the Court in the premises.

Dated, New York, N. Y., September 28, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers.

CHADBOURNE, STANCHFIELD & LEVY,
Attorneys for Receivers,
Office and P. O. Address,
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

Doc. 47

Notice by Receiver of Manhattan Railway Company of Application for Order Re Interest Due on First Mortgage Bonds of Manhattan and for Payment of Taxes.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

091

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

PLEASE TAKE NOTICE that upon the annexed petition of William Roberts, Receiver of Manhattan Railway Company, and upon the proceedings had herein, an application
092 will be made to Hon. Martin T. Manton, United States Circuit Judge designated to hold a term of the District Court of the United States for the Southern District of New York at Room 439, at the Old Post Office Building, Borough of Manhattan, City of New York, at 5 o'clock in the afternoon on September 28, 1932, for an order directing Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, to pay the interest due upon the First Mortgage Bonds of Manhattan Railway Company on October 1, 1932, and the taxes which

have been assessed against the properties of Manhattan Railway Company and are now in default, and granting the other relief requested in said petition.

Dated, New York, September 28, 1932.

Yours, etc.,

HUGHES, SCHURMAN & DWIGHT,
Solicitors for William Roberts, Receiver of Manhattan Railway Company.

To:

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company.

Doc. 47a

Petition of Receiver of Manhattan Railway Company for Order for Payment of Interest on First Mortgage Bonds of Manhattan and for Payment of Taxes.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The petition of William Roberts, Receiver of Manhattan Railway Company, respectfully shows to the Court:

I. He is the duly qualified and acting Receiver of Manhattan Railway Company.

II. Manhattan Railway Company is a railroad corporation organized under the laws of the State of New York and owns a system of elevated railroads in the Boroughs of Manhattan and The Bronx, in the City of New York, which system it leased to the Interborough Rapid Transit Company for the term of 999 years from November 1, 1875, under the terms and conditions and for the rentals set forth in the lease. At the time of the appointment of the Receivers of the property of the Interborough Rapid Tran-

sit Company, that Company was in possession of and was operating its elevated railroads.

III. By the aforesaid lease, the Interborough Rapid Transit Company, as lessee, assumed and agreed among other things to pay to the Manhattan Railway Company as rent the interest on the latter's outstanding bonds which consisted, at the time of the appointment of Receivers, of $40,683,000 principal amount of consolidated mortgage 4% bonds under an indenture dated February 26, 1890, and a supplemental indenture dated June 13, 1899, of which Central Hanover Bank & Trust Company is now Trustee, and $4,523,000 principal amount of second mortgage 4% bonds under an indenture dated June 1, 1913, of which The Chase National Bank of the City of New York is now Trustee. The said lessee also agreed to pay as rent annual dividends at the rate of 7% per annum on the shares of stock of the lessor, consisting of 600,000 shares of the par value of $100 each (an aggregate of $60,000,000) and further agreed to pay as rent, as and when they became due, the taxes, assessments and charges imposed upon the lessor.

IV. The Interborough Rapid Transit Company has failed to pay, in accordance with the terms of said lease, certain special franchise taxes and real estate taxes against the Manhattan Railroad Company amounting to not less than $780,000 and alleged in the bill of complaint herein and admitted by the answer to be in excess of $860,000 and the Receivers of the Interborough Rapid Transit Company have likewise neglected to pay said taxes. By reason of such failure, a default has occurred under the consolidated mortgage and the second mortgage above mentioned.

V. On October 1, 1932, interest in the amount of $813,660 will become due on the $40,683,000 principal amount of consolidated mortgage bonds of Manhattan

Railway Company. Also on October 1, 1932, there will be due and payable a quarterly payment of dividend rental at the rate of 7% per annum, amounting to $76,142.50, on 43,510 shares of stock which did not participate in the Interborough-Manhattan Readjustment Plan of 1922 hereinafter mentioned and $25,000 payable to Manhattan Railway Company.

VI. If this interest is not paid and the tax default under the mortgages is not remedied, the Manhattan Company is confronted with the possibility of an acceleration of the principal amount of its bonds, a foreclosure of the mortgages and a sale of the Manhattan Company properties, with the consequent destruction of the large equity value over and above the principal amount of the mortgages and a dismemberment of the dual system of rapid transit of the City of New York contemplated and provided for by the subway contract and elevated certificates of 1913 pursuant to which the Interborough Rapid Transit Company and the City of New York and Manhattan Railway Company have made large investments.

VII. The properties of the Manhattan Railway Company which are subject to the said lease and all the moneys that have arisen and will arise from the operation thereof are in the possession of the Receivers of Interborough Rapid Transit Company and petitioner has no way of providing the funds necessary to remedy said default and meet said bond interest except by application to this Court.

VIII. The amount of said taxes and bond interest is far less than the amount to which the Manhattan Railway Company is justly and reasonably entitled as proper compensation for the use of its properties and petitioner believes that the Receivers of Interborough Rapid Transit Company have ample funds from which said payments should be made.

IX. The income of the Interborough Rapid Transit Company and of the Receivers thereof from the operation of the dual system of rapid transit railroads in the City of New York is derived principally from the subway and elevated divisions. Under Contract No. 3 relating to the subways, the Interborough Company has, for many years, received and the Receivers thereof will continue to receive a net profit amounting to not less than $3,170,000 per year over and above all expenses of operation including interest and sinking fund charges on all Interborough obligations issued for the construction or equipment of the subways. This sum may be referred to as the net subway preferential.

X. According to preliminary figures available for the year ended June 30, 1932, the net income before payment of taxes obtained by Interborough Rapid Transit Company from the Manhattan division was $3,066,918.00. This sum added to the aforesaid subway net preferential gives a total net revenue available for taxes and fixed charges upon the Manhattan elevated division and other corporate purposes of over $6,000,000 each year.

XI. It is believed that the value of the properties of the Manhattan Railway Company in the possession of the Receivers of the Interborough Company exclusive of additional tracks, power house improvements and extensions constructed pursuant to the certificates of 1913, is not less than $142,000,000; that the cost to Interborough Rapid Transit Company of the elevated extensions and of the third tracks and power plant improvements, has not been in excess of $45,000,000. It is believed that the investment by the Interborough Company in the third tracks and power house improvements upon Manhattan Railway Company property was not less than $27,000,000 and that this investment will be entirely lost to the Interborough and its Receivers in the event of

the termination of the lease. Of the total value of the property devoted for the public use by Interborough Rapid Transit Company and Manhattan Railway Company in connection with the elevated division it is believed that at least five-sixths belongs to the Manhattan Railway Company and is subject to the lien of the first mortgage.

XII. At the time the dual system contracts were entered into by the Interborough Company and the Manhattan Railway Company in 1913, the Manhattan lease was very profitable to Interborough Rapid Transit Company. The earning power of the Manhattan lines was such that the Interborough Rapid Transit Company, as lessee, was able to pay all expenses of operation, taxes and rental amounting to over $6,000,000 each year and nevertheless obtain a net profit upon the lease averaging, over a number of years, approximately $1,500,000.

XIII. By the agreement made by the Interborough Rapid Transit Company with the City of New York in 1913 as construed by the courts, the Interborough Company agreed to operate the elevated railroads constructed pursuant to the elevated certificates together with the lines leased from the Manhattan Railway Company for a five-cent fare. The Manhattan Railway Company has no agreement with the City of New York that its railroads should be operated on a five-cent fare and the earnings of the Manhattan Railway division, as operated by Interborough Rapid Transit Company, is no criterion of the earning power of the railroads of the Manhattan Railway Company under normal conditions and apart from the contractual obligations of Interborough Rapid Transit Company to the City of New York as to the rate of fare to be charged.

XIV. Prior to the Readjustment Plan of 1922 the rental payable by Interborough Rapid Transit Company

to Manhattan Railway Company and its security holders was as follows:

Interest upon outstanding consolidated mortgage bonds of the Manhattan Company	$1,627,320.00
Interest upon Second Mortgage bonds of the Manhattan Company	180,920.00
Cash rental	35,000.00
7% guaranteed rental on $60,000,000 of Manhattan Railway Company stock	4,200,000.00
	$6,043,240.00

XV. In 1922 arrangements were made between the Interborough Rapid Transit Company and the holders of approximately 93% of the outstanding capital stock of Manhattan Railway Company and the Manhattan Railway Company whereby the cash rental payable annually was increased to $50,000 per year and the dividend rental payable to stockholders participating in the plan was due only if earned as provided therein. Since the quarter ending October 1, 1927, the usual rental paid by Interborough Rapid Transit Company to the Manhattan Company and its security holders has been as follows:

Interest upon the outstanding consolidated mortgage bonds of the Manhattan Railway Company	$1,627,320.00
Interest upon second mortgage bonds of the Manhattan Railway Company	180,920.00
Cash rental	50,000.00
7% dividend rental on non-participating stock	304,570.00
	$2,162,810.00

XVI. The rental payable under said lease and Readjustment Plan is less than the amount which should be received by petitioner as fair compensation for the use of the properties of the Manhattan Company.

American Brake Shoe Record.
Petition of Manhattan Receiver Re Interest.

XVII. In any event, the Receivers of the Interborough Rapid Transit Company should protect the Manhattan Company and its stockholders from the consequences of the default which has been permitted to exist under the mortgages of the Manhattan Company and pay the interest upon the first mortgage bonds of the Manhattan Company due on October 1, 1932, and the taxes that have been assessed against the Manhattan Company and are now due, and perform such other obligations as may rest upon the Manhattan Company subject to the further order of the Court.

WHEREFORE, petitioner asks for an order directing the Receivers of Interborough Rapid Transit Company to pay on October 1, 1932, the interest due upon the first mortgage bonds of Manhattan Railway Company and that the Receivers pay the taxes which are due and payable with respect to the properties of the Manhattan Railway Company at the present time, without prejudice to any subsequent application by petitioner for other and further relief in the premises and that the petitioner have such other and further relief as may seem to the Court just and proper.

WILLIAM ROBERTS,
Receiver of Manhattan Railway Company,
Petitioner.

HUGHES, SCHURMAN & DWIGHT,
Solicitors for Petitioner,
100 Broadway,
New York City.

Answer of Committee for Interborough Rapid Transit Company Ten-Year Six Per Cent. Gold Notes to Petition by Receiver of Manhattan Railway Company.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, as a Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company, the defendant herein, intervenors as parties in this suit, for answer to the petition of William Roberts, Receiver of Manhattan Railway Company, verified September 28, 1932, respectfully show to the Court:

FIRST: Your intervenors intervened in this cause pursuant to an order of this Court filed September 2, 1932. Your intervenors are acting as a Committee for the protection of the holders of the said Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of the above named defendant, and as such Committee represent the holders

of a substantial amount of said notes. Said notes mature by their terms on October 1, 1932, and upon that date a semi-annual installment of interest in the amount of $315,000 becomes due. Upon information and belief no provision has been made for the payment thereof or of any part thereof.

SECOND: Your intervenors on information and belief admit the allegations contained in paragraphs numbered I, II, III, IV, V and XIV of said petition.

THIRD: Your intervenors are without knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs numbered VI, VIII, X, XI, XII and XIII of said petition.

FOURTH: Your intervenors are without knowedge or information sufficient to form a belief as to any of the allegations contained in paragraph numbered VII of said petition except that your intervenors admit that the properties of the Manhattan Railway Company which are subject to the lease made by Manhattan Railway Company to the Interborough Rapid Transit Company for the term of 999 years from November 1, 1875, are in the possession of the Receivers of Interborough Rapid Transit Company.

FIFTH: Your intervenors are without knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph numbered IX of said petition except that your intervenors admit that the income of the Interborough Rapid Transit Company and of the Receivers thereof from the operation of rapid transit railroads in the City of New York is derived principally from the subway division.

SIXTH: Your intervenors on information and belief admit the allegations contained in paragraph XV of said

petition except that they deny that the Manhattan Railway Company was a party to the Readjustment Plan of 1922.

SEVENTH: Your intervenors deny each and every allegation contained in paragraphs XVI and XVII of said petition.

WHEREFORE, your intervenors respectfully pray that said petition of William Roberts, as Receiver of Manhattan Railway Company, be in all respects denied.

CHARLES HAYDEN,
EARLE BAILIE,
GRAYSON M.-P. MURPHY,
ALBERT H. WIGGIN and
WILLIS D. WOOD,
Constituting a Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company,
By CHARLES HAYDEN,
Chairman.

ROOT, CLARK & BUCKNER,
Solicitors for Intervenors,
31 Nassau Street,
New York City.

Doc. 38

Answer of Committee for Interborough Rapid Transit Company Ten-Year Six Per Cent. Gold Notes to Receivers' Petition for Instructions.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, as a Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company, the defendant herein, intervenors as parties in this suit, for answer to the petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, verified September 28, 1932, respectfully show to the Court:

FIRST: Your intervenors intervened in this cause pursuant to an order of this Court filed September 2, 1932. Your intervenors are acting as a Committee for the protection of the holders of the said Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of the above named defendant, and as such Committee represent the holders

of a substantial amount of said notes. Said notes mature by their terms on October 1, 1932, and upon that date a semi-annual installment of interest in the amount of $315,000 becomes due. Upon information and belief no provision has been made for the payment thereof or of any part thereof.

SECOND: Your intervenors admit on information and belief all the allegations contained in said petition, except that your intervenors are without knowledge or information sufficient to form a belief as to the accuracy of the figures set forth in paragraphs numbered 9, 12, 12-a, 12-b and 12-c of the said petition.

WHEREFORE, your intervenors join in the prayer of said Receivers.

CHARLES HAYDEN,
EARLE BAILIE,
GRAYSON M.-P. MURPHY,
ALBERT H. WIGGIN and
WILLIS D. WOOD,
Constituting a Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company,
By CHARLES HAYDEN,
Chairman.

ROOT, CLARK & BUCKNER,
Solicitors for Intervenors,
31 Nassau Street,
New York City.

Doc. 39

Answer of Trustee of the Interborough Mortgage to the Petition of the Manhattan Receiver Verified September 28, 1932.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN EQUITY SITTING:

GUARANTY TRUST COMPANY OF NEW YORK (hereinafter sometimes called the "Trustee") as Trustee of the First and Refunding Mortgage (hereinafter sometimes called the "Interborough Mortgage") of Interborough Rapid Transit Company (hereinafter sometimes called the "Interborough") dated March 20, 1913, being a party to the above entitled cause and being concerned with the issues raised by the petition (hereinafter sometimes called the "Manhattan Petition") of William Roberts, as Receiver (hereinafter sometimes called the "Manhattan Receiver") of Manhattan Railway Company (hereinafter sometimes called the "Manhattan") verified and filed herein on September 28, 1932, for its answer respectfully shows:

1. The Trustee admits the allegations contained in the paragraphs of the Manhattan Petition numbered I to III,

both inclusive, but for the precise terms, provisions and conditions of the indentures referred to in the paragraph numbered III, it prays leave to refer to true copies thereof as and when the same are produced upon the hearing upon the Manhattan Petition.

2. The Trustee is without knowledge as to the allegations contained in the paragraphs numbered IV, V, VI, VII, VIII, IX and X of the Manhattan Petition.

3. The Trustee is without knowledge as to the allegations contained in the paragraph numbered XI of the Manhattan Petition, except that it admits that a substantial investment has been made by the Interborough upon properties included in the Manhattan Division, but the exact amount of such investment is unknown to the Trustee.

4. The Trustee is without knowledge as to the allegations contained in the paragraph numbered XII of the Manhattan Petition.

5. The Trustee is without knowledge as to the allegations contained in the paragraph numbered XIII of the Manhattan Petition, except it admits that an agreement was made by Interborough with the City of New York in 1913, but for the precise terms, provisions and conditions of the agreement referred to in said paragraph, it prays leave to refer to a true copy thereof as and when the same shall be produced upon the hearing upon the Manhattan Petition.

6. The Trustee is without knowledge as to the allegations contained in the paragraph numbered XIV of the Manhattan Petition.

7. The Trustee is without knowledge as to the allegations contained in the paragraph numbered XV of the

Manhattan Petition, except it admits that a Readjustment Plan was entered into in 1922 between the Interborough and some of the holders of the capital stock of the Manhattan, but for the precise terms, provisions and conditions of the Readjustment Plan of 1922 it prays leave to refer to a true copy thereof when the same is produced upon the hearing upon the Manhattan Petition.

8. The Trustee is without knowledge as to the allegations contained in the paragraphs numbered XVI and XVII of the Manhattan Petition.

WHEREUPON the Trustee, having answered the Manhattan Petition, affirmatively alleges as follows:

I. On or about March 20, 1913, the Interborough made, executed and delivered to this respondent its First and Refunding Mortgage, dated March 20, 1913, securing $300,000,000 5% Gold Bonds (hereinafter sometimes called the "5% Bonds") dated January 1, 1913, and that there are now outstanding in the hands of the public $132,228,000 principal amount of 5% Bonds, and $54,989,000 principal amount of 5% Bonds are pledged as security for the Ten-Year Secured Convertible 7% Gold Notes (hereinafter sometimes called the "7% Notes") of the Interborough, which 7% Notes matured on September 1, 1932. That the 5% Bonds and the 7% Notes are in the hands of numerous *bona fide* holders for value. That a true copy of the Interborough Mortgage is hereto annexed, marked Schedule 1 and made a part hereof with the same force and effect as if herein set forth at length.

II. That included in the properties subject to the lien of the Interborough Mortgage and pledged thereunder is the Manhattan lease. The Trustee has certified and the Interborough has sold substantial amounts of 5% Bonds as against expenditures upon the properties covered by the Manhattan lease and other appurtenant property for use in connection therewith.

III. As set out in the Interborough Mortgage (Schedule 1 hereto annexed) it is provided in Section 2 of Article Five as follows:

"In case (A) of the happening of one or more of the following events, hereinafter (after the lapse of the times respectively specified in the following subdivisions) called the events of default, that is to say:

* * * * * * * * *

(*g*) Default in the payment of the rent reserved, or in any other payment required to be made, in the lease to the Interborough Company from Manhattan Railway Company, dated January 1, 1903, or in any agreement amendatory thereof or supplemental thereto, or in the performance of any other condition in said lease contained (the breach of which condition by the terms of said lease shall expose the Interborough Company to forfeiture or re-entry), or in the payment of the interest upon any bonds of the Manhattan Railway Company hereafter issued with the consent of the Interborough Company—any of which defaults shall have continued for the period of sixty days after written notice thereof from said Manhattan Railway Company or from the Trustee hereunder; *provided* that in good faith the existence of such default shall not be contested by the Interborough Company.

(*h*) Default in the payment of any installment of the rent reserved, or in any other payment required to be made under the aforesaid Interborough Certificate, or the aforesaid Mnahattan Certificate, of the Public Service Commission of the First District, or default in any other of the provisions or conditions of either such certificate—any of which

defaults by the terms of such cretificate, respectively, shall expose the Interborough Company to forfeiture or re-entry by the City of New York, and any of which defaults shall have continued for the period of sixty days after notice of such default shall have been given to the Interborough Company by the Public Service Commission for the First District (or by any other body in which at the time of any such default the jurisdiction over the subject theretofore possessed by such Public Service Commission lawfully shall be vested); *provided* that the existence of such default shall not be in good faith contested by the Interborough Company;

(*i*) Default in the payment of any installment of rent reserved, or in any other payment required to be made, under any other certificate of the Public Service Commission for the First District in respect of any of the rapid transit railways covered by the aforesaid Contract No. 3, or the aforesaid Interborough Certificate, or the aforesaid Manhattan Certificate, or in respect of any other rapid transit railways on account of the construction or equipment of which bonds secured by this indenture shall have been certified and delivered, or any default in any of the conditions, provisions or covenants in any such contract or certificate, which default would expose the Interborough Company to forfeiture or re-entry, and such default shall have continued for the period of sixty days after notice of such default shall have been given to the Interborough Company by the Public Service Commission for the First District (or from any other body in which at the time of any such default the jurisdiction over the subject theretofore possessed by such Public Service Commission lawfully shall be vested); *provided* that in good faith the existence

of such default shall not be contested by the Interborough Company;

* * * * * * * * * *"

the Trustee may enter upon the property subject to the lien of the Mortgage and exercise all rights provided for in the Mortgage (Schedule 1 hereto annexed).

IV. That in and by the bill of complaint of The American Brake Shoe and Foundry Company filed herein on August 26, 1932, it was prayed that the rights of the plaintiff and of all creditors of the Interborough be ascertained and decreed and that the Court administer the properties and assets of the Interborough, and for such purpose marshal and administer such assets and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities of the creditors of the Interborough as the same might be finally ascertained and decreed by the Court.

V. That subsequent to the entry of the order appointing Receivers herein said Receivers entered upon the property and assets of the Interborough and have since managed and operated the same and have received the tolls, earnings, income and rents thereof.

VI. That the earnings of the Manhattan Division, as more fully set forth in the answer of the Interborough Receivers to the Manhattan Petition, include the earnings of the following four lines of railroads owned by Interborough described as:

(1) The Webster Avenue Line;

(2) The Eighth Avenue and 162nd Street Connection;

(3) The Queensborough Bridge Line; and

(4) The West Farms Subway Connection.

VII. That in and by the lease dated January 1, 1903 (a copy of which is annexed as Exhibit (1) to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer), between the Manhattan and the Intrborough it was provided in Article Fourteenth that upon the expiration of such lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished for or in connection with the Manhattan Division by the Interborough out of its own funds should become the property of the Manhattan upon the payment by the Manhattan of the reasonable value thereof and that in and by the agreement dated March 15, 1913 (a copy of which is annexed as Exhibit (3) to the petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer), between the Manhattan and the Interborough it was provided in Article Sixth thereof that in case of the termination of the lease for any cause and if the Manhattan should be under obligation or should elect under the terms of Article Fourteenth of the agreement of lease dated January 1, 1903, to pay the Interborough the reasonable value of the property, extensions, branches, additions, improvements and equipments constructed, made or furnished by the Interborough out of its own funds, such payment with interest thereon at the rate of 5% from the time of taking possession by the Manhattan should be made by the Manhattan within eighteen months after the date upon which it should give notice of its election to terminate the lease under the provisions of Article Twenty-first of the agreement of lease dated January 1, 1903, and the terms of the agreement of March 15, 1913.

VIII. That in the event of the termination of the Manhattan lease, the Manhattan would be obligated in accordance with the lease agreements dated January 1,

1903, and March 15, 1913, respectively, to make payment to the Interborough for the third tracking of the Second, Third and Ninth Avenue Lines and, also, for the power plants. Pending such payment the rights of the Interborough Receivers and the creditors of the Interborough in and to the earnings of the Manhattan Division allocable to the four lines mentioned in paragraph VI hereof, the third tracking and power plants should be safeguarded and protected by this Court.

IX. That upon information and belief various claims will be asserted against the Interborough Receivers and the Interborough property on account of supplies and materials furnished to the Interborough and that priority of payment of such claims will be asserted.

X. That until the claim, if any, of the Manhattan against the Interborough Receivers and its property is established and its character and priority determined, the payments prayed for in the Manhattan Petition cannot properly be made by this Court.

XI. That pending a final accounting and a determination of the respective rights and priorities of the creditors of the Interborough, the Trustee is advised that it is inadvisable to make payments to particular creditors or classes of creditors.

WHEREFORE, the Trustee, having answered the Manhattan Petition, prays that in any decree entered by this Court upon the Manhattan Petition, the Court will take a just and true account of the matters aforesaid as justice and equity may require and that in any decree which may be entered herein proper provision be made and conditions laid down and required for the safeguarding and protection of the rights of the Trustee and the holders of the 5% Bonds and that the Trustee and the holders of the 5%

1156 *American Brake Shoe Record.*
Answer of Trustee of I. R. T. Mortgage to Petition.

Bonds may have such other and further relief in the premises as the nature and circumstances of the case might require and as to this Court may seem meet.

Dated, October 1, 1932.

GUARANTY TRUST COMPANY OF NEW YORK,
As Trustee of the First and Refunding Mortgage of Interborough Rapid Transit Company dated March 20, 1913,
By GEORGE C. CUTLER,
Vice-President.

1157 (Corporate Seal)

Attest:

F. H. KUHN,
Assistant Secretary.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for Guaranty Trust Company of New York, as Trustee aforesaid,
Office and Post Office Address:
15 Broad Street,
Borough of Manhattan,
City of New York.

1158 EDWIN S. S. SUNDERLAND,
THOMAS O'G. FITZGIBBON,
of Counsel.

Doc. 40

Answer of Trustee of the Interborough Mortgage to the Petition of the Interborough Receivers Verified September 28, 1932.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN EQUITY SITTING:

GUARANTY TRUST COMPANY OF NEW YORK (hereinafter sometimes called the "Trustee") as Trustee of the First and Refunding Mortgage (hereinafter sometimes called the "Interborough Mortgage") of Interborough Rapid Transit Company (hereinafter sometimes called the "Interborough") dated March 20, 1913, by order of this Court, made and entered in the above entitled cause on September 28, 1932, having been made a party to the above entitled cause, pursuant to said order does hereby file its answer to the petition (hereinafter sometimes called the "Petition") of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers (hereinafter sometimes called the "Receivers") of the Interborough, verified and filed herein on September 28, 1932,

files its appearance in this cause, and for its answer respectfully shows:

I. The Trustee admits the allegations contained in paragraphs numbered 1 to 8, inclusive, of the Petition, but for the precise terms, provisions and conditions of the documents referred to in said paragraphs, it prays leave to refer to true copies thereof when the same are produced upon the hearing upon the Petition.

II. The Trustee is without knowledge as to the allegations contained in the paragraphs numbered 9 to 13, in-
163 clusive, of the Petition.

III. With respect to the allegations contained in the paragraph numbered 14 of the Petition, the Trustee prays leave to refer to a true copy of the Manhattan lease when the same is produced upon the hearing upon the Petition.

IV. The Trustee admits the allegations contained in the paragraphs numbered 15 and 16 of the Petition.

V. The Trustee is without knowledge as to the allegations contained in the paragraph numbered 17 of the Petition.

WHEREUPON the Trustee, having answered the Petition,
164 affirmatively alleges as follows:

1. On or about March 20, 1913, the Interborough made, executed and delivered to this respondent its First and Refunding Mortgage dated March 20, 1913, securing $300,000,000 5% Gold Bonds (hereinafter sometimes called the "5% Bonds") dated January 1, 1913, and that there are now outstanding in the hands of the public $132,228,000 principal amount of 5% Bonds, and $54,989,000 principal amount of 5% Bonds are pledged as security for the Ten-Year Secured Convertible 7% Gold Notes (hereinafter

sometimes called the "7% Notes") of the Interborough, which 7% Notes matured on September 1, 1932. That the 5% Bonds and the 7% Notes are in the hands of numerous *bona fide* holders for value. That a true copy of the Interborough Mortgage is hereto annexed, marked Schedule 1 and made a part hereof with the same force and effect as if herein set forth at length.

2. That included in the properties subject to the lien of the Interborough Mortgage and pledged thereunder is the Manhattan lease. The Trustee has certified and the Interborough has sold substantial amounts of 5% Bonds as against expenditures upon the properties covered by the Manhattan lease and other appurtenant property for use in connection therewith.

3. As set out in the Interborough Mortgage (Schedule 1 hereto annexed) it is provided in Section 2 of Article Five as follows:

> "In case (A) of the happening of one or more of the following events, hereinafter (after the lapse of the times respectively specified in the following subdivisions) called the events of default, that is to say:
>
> * * * * * * * * *
>
> (*g*) Default in the payment of the rent reserved, or in any other payment required to be made, in the lease to the Interborough Company from Manhattan Railway Company, dated January 1, 1903, or in any agreement amendatory thereof or supplemental thereto, or in the performance of any other condition in said lease contained (the breach of which condition by the terms of said lease shall expose the Interborough Company to forfeiture or re-entry), or in the payment of the interest upon any bonds of the Manhattan Railway Company hereafter issued with the consent of the Interborough Com-

pany,—any of which defaults shall have continued for the period of sixty days after written notice thereof from said Manhattan Railway Company or from the Trustee hereunder; *provided* that in good faith the existence of such default shall not be contested by the Interborough Company;

(*h*) Default in the payment of any installment of the rent reserved, or in any other payment required to be made under the aforesaid Interborough Certificate, or the aforesaid Manhattan Certificate, of the Public Service Commission of the First District, or default in any other of the provisions or conditions of either such certificate,—any of which defaults by the terms of such certificate, respectively, shall expose the Interborough Company to forfeiture or re-entry by the City of New York, and any of which defaults shall have continued for the period of sixty days after notice of such default shall have been given to the Interborough Company by the Public Service Commission for the First District (or by any other body in which at the time of any such default the jurisdiction over the subject theretofore possessed by such Public Service Commission lawfully shall be vested); *provided* that the existence of such default shall not be in good faith contested by the Interborough Company;

(*i*) Default in the payment of any installment of rent reserved, or in any other payment required to be made, under any other certificate of the Public Service Commission for the First District in respect of any of the rapid transit railways covered by the aforesaid Contract No. 3, or the aforesaid Interborough Certificate, or the aforesaid Manhattan Certificate, or in respect of any other rapid transit railways on account of the construction or equipment of which bonds secured by this indenture

shall have been certified and delivered, or any default in any of the conditions, provisions or covenants in any such contract or certificate, which default would expose the Interborough Company to forfeiture or re-entry, and such default shall have continued for the period of sixty days after notice of such default shall have been given to the Interborough Company by the Public Service Commission for the First District (or from any other body in which at the time of any such default the jurisdiction over the subject theretofore possessed by such Public Service Commission lawfully shall be vested); *provided* that in good faith the existence of such default shall not be contested by the Interborough Company;

* * * * * * * * *"

the Trustee may enter upon the property subject to the lien of the Mortgage and exercise all rights provided for in the Mortgage (Schedule 1 hereto annexed).

4. That in and by the bill of complaint of The American Brake Shoe and Foundry Company filed herein on August 26, 1932, it was prayed that the rights of the plaintiff and of all creditors of the Interborough be ascertained and decreed and that the Court administer the properties and assets of the Interborough and for such purpose marshal and administer such assets and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities of the creditors of the Interborough as the same might be finally ascertained and decreed by the Court.

5. That subsequent to the entry of the order appointing Receivers herein said Receivers entered upon the property and assets of the Interborough and have since managed and operated the same and have received the tolls, earnings, income and rents thereof.

6. That the earnings of the Manhattan Division, as more fully set forth in the answer of the Interborough Receivers to the Manhattan Petition, include the earnings of the following four lines of railroads owned by Interborough described as:

(1) The Webster Avenue Line;

(2) The Eighth Avenue and 162nd Street Connection;

(3) The Queensborough Bridge Line; and

(4) The West Farms Subway Connection.

7. That in and by the lease dated January 1, 1903, (a copy of which is annexed as Exhibit (1) to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Fourteenth that upon the expiration of such lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished for or in connection with the Manhattan Division by the Interborough out of its own funds should become the property of the Manhattan upon the payment by the Manhattan of the reasonable value thereof and that in and by the agreement dated March 15, 1913, (a copy of which is annexed as Exhibit (3) to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Sixth thereof that in case of the termination of the lease for any cause and if the Manhattan should be under obligation or should elect under the terms of Article Fourteenth of the agreement of lease dated January 1, 1903, to pay the Interborough the reasonable value of the property, extensions, branches, additions, improvements and equipments constructed, made

or furnished by the Interborough out of its own funds, such payment with interest thereon at the rate of 5% from the time of taking possession by the Manhattan should be made by the Manhattan within eighteen months after the date upon which it should give notice of its election to terminate the lease under the provisions of Article Twenty-first of the agreement of lease dated January 1, 1903, and the terms of the agreement of March 15, 1913.

8. That in the event of the termination of the Manhattan Lease, the Manhattan would be obligated in accordance with the lease agreements dated January 1, 1903 and March 15, 1913, respectively, to make payment to the Interborough for the third tracking of the Second, Third and Ninth Avenue Lines and, also, for the power plants. Pending such payment the rights of the Interborough Receivers and the creditors of the Interborough in and to the earnings of the Manhattan Division allocable to the four lines mentioned in paragraph 6 hereof, the third tracking and power plants should be safeguarded and protected by this Court.

9. That upon information and belief various claims will be asserted against the Interborough Receivers and the Interborough property on account of supplies and materials furnished to the Interborough and that priority of payment of such claims will be asserted.

10. That until the claim, if any, of the Manhattan against the Interborough Receivers and its property is established and its character and priority determined, the payments referred to in the Petition cannot properly be made by this Court.

11. That pending a final accounting and a determination of the respective rights and priorities of the creditors of the Interborough, the Trustee is advised that it is in-

advisable to make payments to particular creditors or classes of creditors.

WHEREFORE, the Trustee, having answered the Interborough Petition, prays that in any decree entered by this Court upon the Interborough Petition, the Court will take a just and true account of the matters aforesaid as justice and equity may require and that in any decree which may be entered herein proper provision be made and conditions laid down and required for the safeguarding and protection of the rights of the Trustee and the holders of the 5% Bonds and that the Trustee and the holders of the 5% Bonds may have such other and further relief in the premises as the nature and circumstances of the case might require and as to this Court may seem meet.

Dated, October 1, 1932.

GUARANTY TRUST COMPANY OF NEW YORK,
As Trustee of the First and Refunding Mortgage of Interborough Rapid Transit Company dated March 20, 1913,
By GEORGE C. CUTLER,
Vice-President.

(Corporate Seal)

Attest:
F. H. KUHN,
Assistant Secretary.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for Guaranty Trust Company of New York, as Trustee as aforesaid,
Office and Post Office Address:
15 Broad Street,
Borough of Manhattan,
City of New York.

EDWIN S. S. SUNDERLAND,
THOMAS O'G. FITZGIBBON,
of Counsel.

Doc. 41

Answer of Committee Representing Interborough 5% Gold Bonds to Petition of the Manhattan Receiver Verified September 28, 1932.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN EQUITY SITTING:

J. P. MORGAN, Chairman, A. M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY, and CHARLES E. MITCHELL (hereinafter collectively called the "Committee"), constituted and acting as a Committee under the Deposit Agreement (hereinafter sometimes called the "5% Bonds Deposit Agreement") dated as of August 31, 1932, with respect to Interborough Rapid Transit Company (hereinafter sometimes called the "Interborough") First and Refunding Mortgage 5% Gold Bonds (hereinafter sometimes called the "5% Bonds"), being a party to the above entitled cause and being concerned with the issues raised by the petition (hereinafter sometimes called the "Manhattan Petition") of William Roberts, as Receiver

(hereinafter sometimes called the "Manhattan Receiver") of Manhattan Railway Company (hereinafter sometimes called the "Manhattan") verified and filed herein on September 28, 1932, for its answer respectfully shows:

1. It admits the allegations contained in the paragraphs of the Manhattan Petition numbered I to III, both inclusive, but for the precise terms, provisions and conditions of the indentures referred to in the paragraph numbered III, it prays leave to refer to true copies thereof as and when the same are produced upon the hearing upon the Manhattan Petition.

187 2. It is without knowledge as to the allegations contained in the paragraphs numbered IV, V, VI, VII, VIII, IX and X of the Manhattan Petition.

3. It is without knowledge as to the allegations contained in the paragraph numbered XI of the Manhattan Petition, except that it admits that a substantial investment has been made by the Interborough upon properties included in the Manhattan Division, but the exact amount of such investment is unknown to the Committee.

4. It is without knowledge as to the allegations contained in the paragraph numbered XII of the Manhattan Petition.

188 5. It is without knowledge as to the allegations contained in the paragraph numbered XIII of the Manhattan Petition, except it admits that an agreement was made by Interborough with the City of New York in 1913, but for the precise terms, provisions and conditions of the agreement referred to in said paragraph, it prays leave to refer to a true copy thereof as and when the same shall be produced upon the hearing upon the Manhattan Petition.

6. It is without knowledge as to the allegations contained in the paragraph numbered XIV of the Manhattan Petition.

7. It is without knowledge as to the allegations contained in the paragraph numbered XV of the Manhattan Petition, except it admits that a Readjustment Plan was entered into in 1922 between the Interborough and some of the holders of the capital stock of the Manhattan but for the precise terms, provisions and conditions of the Readjustment Plan of 1922 it prays leave to refer to a true copy thereof when the same is produced upon the hearing upon the Manhattan Petition.

8. It is without knowledge as to the allegations contained in the paragraphs numbered XVI and XVII of the Manhattan Petition.

WHEREUPON the Committee, having answered the Manhattan Petition, affirmatively alleges as follows:

I. That the Committee by order of this Court was permitted to intervene as a party defendant to the above entitled cause.

II. That the Committee holds a substantial amount of the 5% Bonds under the 5% Bonds Deposit Agreement and that such 5% Bonds are the valid and enforceable obligations of the Interborough.

III. That in and by the bill of complaint of The American Brake Shoe and Foundry Company filed herein on August 26, 1932, it was prayed that the rights of the plaintiff and of all creditors of the Interborough be ascertained and decreed and that the Court administer the properties and assets of the Interborough and for such purpose marshal and administer such assets and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities of the creditors of the Interborough as the same might be finally ascertained and decreed by the Court.

IV. That subsequent to the entry of the order appointing Receivers herein said Receivers entered upon the prop-

192 erty and assets of the Interborough and have since managed and operated the same and have received the tolls, earnings, income and rents thereof.

V. That the earnings of the Manhattan Division, as more fully set forth in the answer of the Interborough Receivers to the Manhattan Petition, include the earnings of the following lines owned by Interborough:

1. The Webster Avenue Line;

2. The Eighth Avenue and 162nd Street Connection;

193 3. The Queensborough Bridge Line; and

4. The West Farms Subway Connection.

VI. That in and by the lease dated January 1, 1903 (a copy of which is annexed as Exhibit 1 to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Fourteenth that upon the expiration of such lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished for or in connection with the Manhattan Division by the Interborough out of its own funds should become the property of the Manhattan
194 upon the payment by the Manhattan of the reasonable value thereof and that in and by the Agreement dated March 15, 1913, (a copy of which is annexed as Exhibit 3 to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Sixth thereof that in case of the termination of the lease for any cause, and if the Manhattan should be under obligation, or should elect, under the terms of Article Fourteenth of the Agreement of lease dated January 1, 1903, to pay the Interborough the reason-

able value of the property, extensions, branches, additions, improvements and equipments constructed, made or furnished by the Interborough out of its own funds, such payment with interest thereon at the rate of 5% from the time of taking possession by the Manhattan should be made by the Manhattan within eighteen months after the date upon which it should give notice of its election to terminate the lease under the provisions of Article Twenty-first of the agreement of lease dated January 1, 1903, and the terms of the agreement of March 15, 1913.

VII. That in the event of the termination of the Manhattan lease, the Manhattan would be obligated in accordance with the lease agreements dated January 1, 1903 and March 15, 1913, respectively, to make payment to the Interborough for the third tracking of the Second, Third and Ninth Avenue Lines and, also, for the power plants. Pending such payment the rights of the Interborough Receivers and the creditors of the Interborough in and to the earnings of the Manhattan Division allocable to the four lines mentioned in paragraph V hereof, the third tracking, and power plants should be safeguarded and protected by this Court.

VIII. That upon information and belief various claims will be asserted against the Interborough Receivers and the Interborough property on account of supplies and materials furnished to the Interborough and that priority of payment of such claims will be asserted.

IX. That until the claim, if any, of the Manhattan against the Interborough Receivers and its property is established and its character and priority determined, the payments prayed for in the Manhattan Petition cannot properly be made by this Court.

X. That pending a final accounting and a determination of the respective rights and priorities of the creditors of the Interborough, the Committee is advised that it is in-

advisable to make payments to particular creditors or classes of creditors.

WHEREFORE, the Committee, having answered the Manhattan Petition, prays that in any decree entered by this Court upon the Manhattan Petition, the Court will take a just and true account of the matters aforesaid as justice and equity may require and that in any decree which may be entered herein proper provision be made and conditions laid down and required for the safeguarding and protection of the rights of the Committee and the holders of the 5% Bonds and that the Committee and the holders
1199 of the 5% Bonds may have such other and further relief in the premises as the nature and circumstances of the case might require and as to this Court may seem meet.

Dated, October 1, 1932.

J. P. MORGAN, Chairman,
A. M. ANDERSON,
FREDERIC W. ALLEN,
GEORGE F. BAKER,
EDWARD D. DUFFIELD,
F. H. ECKER,
HALSTEAD G. FREEMAN,
DARWIN P. KINGSLEY,
1200 G. HERMANN KINNICUTT,
H. C. MCELDOWNEY, and
CHARLES E. MITCHELL,

Constituted and acting as a Committee under the Deposit Agreement dated as of August 31, 1932, with respect to Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, and not individually, by

ARTHUR M. ANDERSON.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for the Committee above mentioned,
Office and Post Office Address:
15 Broad Street,
Borough of Manhattan,
City of New York.

EDWIN S. S. SUNDERLAND,
THOMAS O'G. FITZGIBBON,
Of Counsel.

204 Doc. 42

Answer of Committee Representing Interborough Ten-Year Secured Convertible 7% Gold Notes to Petition of the Manhattan Receiver Verified September 28, 1932.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff,	
205 against	In Equity E 70-364
INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN EQUITY SITTING:

J. P. MORGAN, Chairman, A. M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY, and CHARLES E. MITCHELL (hereinafter collectively called the "Com-
1206 mittee"), constituted and acting as a Committee under the Deposit Agreement (hereinafter sometimes called the "7% Notes Deposit Agreement") dated as of July 19, 1932, with respect to Interborough Rapid Transit Company (hereinafter sometimes called the "Interborough") Ten-Year Secured Convertible 7% Gold Notes (hereinafter sometimes called the "7% Notes"), being a party to the above entitled cause and being concerned with the

issues raised by the petition (hereinafter sometimes called the "Manhattan Petition") of William Roberts, as Receiver (hereinafter sometimes called the "Manhattan Receiver") of Manhattan Railway Company (hereinafter sometimes called the "Manhattan") verified and filed herein on September 28, 1932, for its answer respectfully shows:

1. It admits the allegations contained in the paragraphs of the Manhattan Petition numbered I to III, both inclusive, but for the precise terms, provisions and conditions of the indentures referred to in the paragraph numbered III, it prays leave to refer to true copies thereof as and when the same are produced upon the hearing upon the Manhattan Petition.

2. It is without knowledge as to the allegations contained in the paragraphs numbered IV, V, VI, VII, VIII, IX and X of the Manhattan Petition.

3. It is without knowledge as to the allegations contained in the paragraph numbered XI of the Manhattan Petition, except it admits that a substantial investment has been made by the Interborough upon properties included in the Manhattan Division, but the exact amount of such investment is unknown to the Committee.

4. It is without knowledge as to the allegations contained in the paragraph numbered XII of the Manhattan Petition.

5. It is without knowledge as to the allegations contained in the paragraph numbered XIII of the Manhattan Petition, except it admits that an agreement was made by Interborough with the City of New York in 1913, but for the precise terms, provisions and conditions of the agreement referred to in said paragraph, it prays leave to refer to a true copy thereof as and when the same shall be produced upon the hearing upon the Manhattan Petition.

210 *American Brake Shoe Record.*
Answer of I. R. T. 7% Note Committee to Petition.

6. It is without knowledge as to the allegations contained in the paragraph numbered XIV of the Manhattan Petition.

7. It is without knowledge as to the allegations contained in the paragraph numbered XV of the Manhattan Petition, except it admits that a Readjustment Plan was entered into in 1922 between the Interborough and some of the holders of the capital stock of the Manhattan, but for the precise terms, provisions and conditions of the Readjustment Plan of 1922 it prays leave to refer to a true copy thereof when the same is produced upon the hearing
1211 upon the Manhattan Petition.

8. It is without knowledge as to the allegations contained in the paragraphs numbered XVI and XVII of the Manhattan Petition.

WHEREUPON the Committee, having answered the Manhattan Petition, affirmatively alleges, as follows:

I. That the Committee by order of this Court was permitted to intervene as a party defendant to the above entitled cause.

II. That the Committee holds a substantial amount of the 7% Notes under the 7% Notes Deposit Agreement and that such 7% Notes are the valid and enforceable
1212 obligations of the Interborough.

III. That in and by the bill of complaint of the American Brake Shoe and Foundry Company filed herein on August 26, 1932, it was prayed that the rights of the plaintiff and of all creditors of the Interborough be ascertained and decreed and that the Court administer the properties and assets of the Interborough and for such purpose marshal and administer such assets and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities

of the creditors of the Interborough as the same might be finally ascertained and decreed by the Court.

IV. That subsequent to the entry of the order appointing Receivers herein said Receivers entered upon the property and assets of the Interborough and have since managed and operated the same and have received the tolls, earnings, income and rents thereof.

V. That the earnings of the Manhattan Division, as more fully set forth in the answer of the Interborough Receivers to the Manhattan Petition, include the earnings of the following lines owned by Interborough: 12

1. The Webster Avenue Line;

2. The Eighth Avenue and 162nd Street Connection;

3. The Queensborough Bridge Line; and

4. The West Farms Subway Connection.

VI. That in and by the lease dated January 1, 1903, (a copy of which is annexed as Exhibit 1 to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Fourteenth that upon the expiration of such lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished for or in connection with the Manhattan Division by the Interborough out of its own funds should become the property of the Manhattan upon the payment by the Manhattan of the reasonable value thereof and that in and by the Agreement dated March 15, 1913, (a copy of which is annexed as Exhibit 3 to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Sixth thereof that in 121

case of the termination of the lease for any cause, and if the Manhattan should be under obligation, or should elect, under the terms of Article Fourteenth of the agreement of lease dated January 1, 1903, to pay the Interborough the reasonable value of the property, extensions, branches, additions, improvements and equipments constructed, made or furnished by the Interborough out of its own funds, such payment with interest thereon at the rate of 5% from the time of taking possession by the Manhattan should be made by the Manhattan within eighteen months after the date upon which it should give notice of its election to terminate the lease under the
217 provisions of Article Twenty-first of the agreement of lease dated January 1, 1903, and the terms of the agreement of March 15, 1913.

VII. That in the event of the termination of the Manhattan lease, the Manhattan would be obligated in accordance with the lease agreements dated January 1, 1903 and March 15, 1913, respectively, to make payment to the Interborough for the third tracking of the Second, Third and Ninth Avenue Lines and, also, for the power plants. Pending such payments the rights of the Interborough Receivers and the creditors of the Interborough in and to the earnings of the Manhattan Division allocable to the four lines mentioned in paragraph V hereof, the third tracking, and power plants should be safeguarded and
218 protected by this Court.

VIII. That upon information and belief various claims will be asserted against the Interborough Receivers and the Interborough property on account of supplies and materials furnished to the Interborough and that priority of payment of such claims will be asserted.

IX. That until the claim, if any, of the Manhattan against the Interborough Receivers and its property is established and its character and priority determined, the payment prayed for in the Manhattan Petition cannot properly be made by this Court.

X. That pending a final accounting and a determination of the respective rights and priorities of the creditors of the Interborough, the Committee is advised that it is inadvisable to make payments to particular creditors or classes of creditors.

WHEREFORE, the Committee, having answered the Manhattan Petition, prays that in any decree entered by this Court upon the Manhattan Petition, the Court will take a just and true account of the matters aforesaid as justice and equity may require and that in any decree which may be entered herein proper provision be made and conditions laid down and required for the safeguarding and protection of the rights of the Committee and the holders of the 7% Notes and that the Committee and the holders of the 7% Notes may have such other and further relief in the premises as the nature and circumstances of the case might require and as to this Court may seem meet.

Dated, October 1, 1932.

J. P. MORGAN, Chairman,
A. M. ANDERSON,
FREDERIC W. ALLEN,
GEORGE F. BAKER,
EDWARD D. DUFFIELD,
F. H. ECKER,
HALSTEAD G. FREEMAN,
DARWIN P. KINGSLEY,
G. HERMANN KINNICUTT,
H. C. MCELDOWNEY, and
CHARLES E. MITCHELL,

Constituted and acting as a Committee under the Deposit Agreement dated as of July 19, 1932, with respect to Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, and not individually, by

ARTHUR M. ANDERSON

1222

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for the Committee above mentioned,
Office and Post Office Address:
15 Broad Street,
Borough of Manhattan,
City of New York.

EDWIN S. S. SUNDERLAND,
THOMAS O'G. FITZGIBBON,
Of Counsel.

1223

1224

Doc. 43

Answer of Committee Representing Interborough 5% Gold Bonds to the Petition of the Interborough Receivers.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN EQUITY SITTING:

J. P. MORGAN, Chairman, A. M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY, and CHARLES E. MITCHELL (hereinafter collectively called the "Committee"), constituted and acting as a Committee under the Deposit Agreement (hereinafter sometimes called the "5% Bonds Deposit Agreement") dated as of August 31, 1932, with respect to Interborough Rapid Transit Company (hereinafter sometimes called the "Interborough") First and Refunding Mortgage 5% Gold Bonds (hereinafter sometimes called the "5% Bonds") pursuant to the order of this Court made and entered herein on September

28, 1932, as such Committee does hereby file its answer to the petition (hereinafter sometimes called the "Petition") of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers (hereinafter sometimes called the "Receivers") of the Interborough, verified and filed herein on September 28, 1932, and for its answer respectfully shows:

1. The Committee admits the allegations contained in paragraphs numbered 1 to 8, inclusive, of the Petition, but for the precise terms, provisions and conditions of the documents referred to in said paragraphs, it prays leave to refer to true copies thereof when the same are produced upon the hearing upon the Petition.

2. The Committee is without knowledge as to the allegations contained in the paragraphs numbered 9 to 13, inclusive, of the Petition.

3. With respect to the allegations contained in the paragraph numbered 14 of the Petition, the Committee prays leave to refer to a true copy of the Manhattan lease when the same is produced upon the hearing upon the Petition.

4. The Committee admits the allegations contained in the paragraphs numbered 15 and 16 of the Petition.

5. The Committee is without knowledge as to the allegations contained in the paragraph numbered 17 of the Petition.

WHEREUPON the Committee, having answered the Interborough Petition, affirmatively alleges as follows:

I. That the Committee by order of this Court was permitted to intervene as a party defendant to the above entitled cause.

II. That the Committee holds a substantial amount of the 5% Bonds under the 5% Bonds Deposit Agreement and

that such 5% Bonds are the valid and enforceable obligation of the Interborough.

III. That in and by the bill of complaint of The American Brake Shoe and Foundry Company filed herein on August 26, 1932, it was prayed that the rights of the plaintiff and of all creditors of the Interborough be ascertained and decreed and that the Court administer the properties and assets of the Interborough and for such purpose marshal and administer such assets and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities of the creditors of the Interborough as the same might be finally ascertained and decreed by the Court.

IV. That subsequent to the entry of the order appointing Receivers herein said Receivers entered upon the property and assets of the Interborough and have since managed and operated the same and have received the tolls, earnings, income and rents thereof.

V. That the earnings of the Manhattan Division, as more fully set forth in the answer of the Interborough Receivers to the Manhattan Petition, include the earnings of the following four lines of railroads owned by Interborough described as:

(1) The Webster Avenue Line;

(2) The Eighth Avenue and 162nd Street Connection;

(3) The Queensborough Bridge Line; and

(4) The West Farms Subway Connection.

VI. That in and by the lease dated January 1, 1903 (a copy of which is annexed as Exhibit (1) to the Petition verified September 28, 1932, of the Interborough Receivers,

and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Fourteenth that upon the expiration of such lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipment constructed, made or furnished for or in connection with the Manhattan Division by the Interborough out of its own funds should become the property of the Manhattan upon the payment by the Manhattan of the reasonable value thereof and that in and by the agreement dated March 15, 1913 (a copy of which is annexed as Exhibit (3) to the Petition verified September 28, 1932, of
235 the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Sixth thereof that in case of the termination of the lease for any cause and if the Manhattan should be under obligation or should elect under the terms of Article Fourteenth of the agreement of lease dated January 1, 1903, to pay the Interborough the reasonable value of the property, extensions, branches, additions, improvements and equipment constructed, made or furnished by the Interborough out of its own funds, such payment with interest thereon at the rate of 5% from the time of taking possession by the Manhattan should be made by the Manhattan within eighteen months after the date upon which it should give notice
236 of its election to terminate the lease under the provisions of Article Twenty-first of the agreement of lease dated January 1, 1903, and the terms of the agreement of March 15, 1913.

VII. That in the event of the termination of the Manhattan lease, the Manhattan would be obligated in accordance with the lease agreements dated January 1, 1903, and March 15, 1913, respectively, to make payment to the Interborough for the third tracking of the Second, Third and

Ninth Avenue Lines and, also, for the power plants. Pending such payment the rights of the Interborough Receivers and the creditors of the Interborough in and to the earnings of the Manhattan Division allocable to the four lines mentioned in paragraph V hereof, the third tracking, and power plants should be safeguarded and protected by this Court.

VIII. That upon information and belief various claims will be asserted against the Interborough Receivers and the Interborough property on account of supplies and materials furnished to the Interborough and that priority of payment of such claims will be asserted.

IX. That until the claim, if any, of the Manhattan against the Interborough Receivers and its property is established and its character and priority determined, the payments referred to in the Petition cannot properly be made by this Court.

X. That pending a final accounting and a determination of the respective rights and priorities of the creditors of the Interborough, the Committee is advised that it is inadvisable to make payments to particular creditors or classes of creditors.

WHEREFORE, the Committee, having answered the Interborough Petition, prays that in any decree entered by this Court upon the Interborough Petition, the Court will take a just and true account of the matters aforesaid as justice and equity may require and that in any decree which may be entered herein proper provision be made and conditions laid down and required for the safeguarding and protection of the rights of the Committee and the holders of the 5% Bonds and that the Committee and the holders of the 5% Bonds may have such other and further relief in the

premises as the nature and circumstances of the case might require and as to this Court may seem meet.

Dated, October 1, 1932.

J. P. MORGAN, Chairman,
A. M. ANDERSON,
FREDERIC W. ALLEN,
GEORGE F. BAKER,
EDWARD D. DUFFIELD,
F. H. ECKER,
HALSTEAD G. FREEMAN,
DARWIN P. KINGSLEY,
G. HERMANN KINNICUTT,
H. C. MCELDOWNEY, and
CHARLES E. MITCHELL,

Constituted and acting as a Committee under the Deposit Agreement dated as of August 31, 1932, with respect to Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, and not individually, by

ARTHUR M. ANDERSON.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for the Committee above mentioned,
Office and Post Office Address,
15 Broad Street,
Borough of Manhattan,
City of New York.

EDWIN S. S. SUNDERLAND,
THOMAS O'G. FITZGIBBON,
of Counsel.

Doc. 44

Answer of Committee Representing Interborough Ten-Year Secured Convertible 7% Gold Notes to the Petition of the Interborough Receivers Verified September 28, 1932.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN EQUITY SITTING:

J. P. MORGAN, Chairman, A. M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY, and CHARLES E. MITCHELL (hereinafter collectively called the "Committee"), constituted and acting as a Committee under the Deposit Agreement (hereinafter sometimes called the "7% Notes Deposit Agreement") dated as of July 19, 1932, with respect to Interborough Rapid Transit Company (hereinafter sometimes called the "Interborough") Ten-Year Secured Convertible 7% Gold Notes (hereinafter sometimes called the "7% Notes") pursuant to the order of this Court made and entered herein on

September 28, 1932, as such Committee does hereby file its answer to the petition (hereinafter sometimes called the "Petition") of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers (hereinafter sometimes called the "Receivers") of the Interborough, verified and filed herein on September 28, 1932, and for its answer respectfully shows:

1. The Committee admits the allegations contained in paragraphs numbered 1 to 8, inclusive, of the Petition, but for the precise terms, provisions and conditions of the documents referred to in said paragraphs, it prays leave to refer to true copies thereof when the same are produced upon the hearing upon the Petition.

2. The Committee is without knowledge as to the allegations contained in the paragraphs numbered 9 to 13, inclusive, of the Petition.

3. With respect to the allegations contained in the paragraph numbered 14 of the Petition, the Committee prays leave to refer to a true copy of the Manhattan lease when the same is produced upon the hearing upon the Petition.

4. The Committee admits the allegations contained in the paragraphs numbered 15 and 16 of the Petition.

5. The Committee is without knowledge as to the allegations contained in the paragraph numbered 17 of the Petition.

WHEREUPON the Committee, having answered the Interborough Petition, affirmatively alleges as follows:

I. That the Committee by order of this Court was permitted to intervene as a party defendant to the above entitled cause.

II. That the Committee holds a substantial amount of the 7% Notes under the 7% Notes Deposit Agreement and that such 7% Notes are the valid and enforceable obligations of the Interborough.

III. That in and by the bill of complaint of The American Brake Shoe and Foundry Company filed herein on August 26, 1932, it was prayed that the rights of the plaintiff and of all creditors of the Interborough be ascertained and decreed and that the Court administer the properties and assets of the Interborough and for such purpose marshal and administer such assets and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities of the creditors of the Interborough as the same might be finally ascertained and decreed by the Court.

IV. That subsequent to the entry of the order appointing Receivers herein said Receivers entered upon the property and assets of the Interborough and have since managed and operated the same and have received the tolls, earnings, income and rents thereof.

V. That the earnings of the Manhattan Division, as more fully set forth in the answer of the Interborough Receivers to the Manhattan Petition, include the earnings of the following four lines of railroads owned by Interborough described as:

(1) The Webster Avenue Line;

(2) The Eighth Avenue and 162nd Street Connection;

(3 The Queensborough Bridge Line; and

(4) The West Farms Subway Connection.

VI. That in and by the lease dated January 1, 1903 (a copy of which is annexed as Exhibit (1) to the Petition

verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer), between the Manhattan and the Interborough it was provided in Article Fourteenth that upon the expiration of such lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished for or in connection with the Manhattan Division by the Interborough out of its own funds should become the property of the Manhattan upon the payment by the Manhattan of the reasonable value thereof and that in and by the agreement dated March 15, 1913 (a copy of which is annexed as Exhibit (3) to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer), between the Manhattan and the Interborough it was provided in Article Sixth thereof that in case of the termination of the lease for any cause and if the Manhattan should be under obligation or should elect under the terms of Article Fourteenth of the agreement of lease dated January 1, 1903, to pay the Interborough the reasonable value of the property, extensions, branches, additions, improvements and equipments constructed, made or furnished by the Interborough out of its own funds, such payment with interest thereon at the rate of 5% from the time of taking possession by the Manhattan should be made by the Manhattan within eighteen months after the date upon which it should give notice of its election to terminate the lease under the provisions of Article Twenty-first of the agreement of lease dated January 1, 1903, and the terms of the agreement of March 15, 1913.

VII. That in the event of the termination of the Manhattan lease, the Manhattan would be obligated in accordance with the lease agreements dated January 1, 1903, and March 15, 1913, respectively, to make payment to the Interborough for the third tracking of the Second, Third

and Ninth Avenue Lines and, also, for the power plants. Pending such payment the rights of the Interborough Receivers and the creditors of the Interborough in and to the earnings of the Manhattan Division allocable to the four lines mentioned in paragraph V hereof, the third tracking, and power plants should be safeguarded and protected by this Court.

VIII. That upon information and belief various claims will be asserted against the Interborough Receivers and the Interborough property on account of supplies and materials furnished to the Interborough and that priority of payment of such claims will be asserted.

IX. That until the claim, if any, of the Manhattan against the Interborough Receivers and its property is established and its character and priority determined, the payments referred to in the Petition cannot properly be made by this Court.

X. That pending a final accounting and a determination of the respective rights and priorities of the creditors of the Interborough, the Committee is advised that it is inadvisable to make payments to particular creditors or classes of creditors.

WHEREFORE, the Committee, having answered the Interborough Petition, prays that in any decree entered by this Court upon the Interborough Petition, the Court will take a just and true account of the matters aforesaid as justice and equity may require and that in any decree which may be entered herein proper provision be made and conditions laid down and required for the safeguarding and protection of the rights of the Committee and the holders of the 7% Notes and that the Committee and the holders of the 7% Notes may have such other and further relief

in the premises as the nature and circumstances of the case might require and as to this Court may seem meet.

Dated, October 1, 1932.

J. P. MORGAN, Chairman,
A. M. ANDERSON,
FREDERIC W. ALLEN,
GEORGE F. BAKER,
EDWARD D. DUFFIELD,
F. H. ECKER,
HALSTEAD G. FREEMAN,
DARWIN P. KINGSLEY,
G. HERMANN KINNICUTT,
H. C. MCELDOWNEY, and
CHARLES E. MITCHELL.

Constituted and acting as a Committee under the Deposit Agreement dated as of July 19, 1932, with respect to Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, and not individually, by

ARTHUR M. ANDERSON.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for the Committee above mentioned,
Office and Post Office Address,
15 Broad Street,
Borough of Manhattan,
City of New York.

EDWIN S. S. SUNDERLAND,
THOMAS O'G. FITZGIBBON,
of Counsel.

Doc. 45

Notice of Appearance of Counsel on Behalf of Guaranty Trust Company of New York, As Trustee.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

Sirs:

PLEASE TAKE NOTICE that we are retained by and appear in this action as attorneys and solicitors for Guaranty Trust Company of New York, as Trustee of the First and Refunding Mortgage dated March 20, 1913, of Interborough Rapid Transit Company, and demand that all documents in this action be served on us at our office, No. 15 Broad Street, Borough of Manhattan, City of New York, New York.

Dated, New York, N. Y., October 1, 1932.

Yours, etc.,

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for Guaranty Trust Company
of New York, as Trustee, as aforesaid,
Office and Post Office Address:
15 Broad Street,
Borough of Manhattan,
City of New York.

264 *American Brake Shoe Record.*

Notice of Appearance for Guaranty Trust Co.

To:

CHADBOURNE, STANCHFIELD & LEVY, Esqrs.,
Attorneys for the Receivers,
25 Broadway, New York City.

JAMES L. QUACKENBUSH, Esq.,
Attorney for Interborough Rapid Transit Company,
165 Broadway, New York City.

BREED, ABBOTT & MORGAN, Esqrs.,
Attorneys for The American Brake Shoe and Foun-
1265 dry Company,
15 Broad Street, New York City.

HUGHES, SCHURMAN & DWIGHT, Esqrs.,
Attorneys for the Receiver of Manhattan Railway Company,
100 Broadway, New York City.

COTTON, FRANKLIN, WRIGHT & GORDON, Esqrs.,
Attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,
63 Wall Street, New York City.

ROOT, CLARK & BUCKNER, Esqrs.,
1266 Attorneys for the Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company,
31 Nassau Street, New York City.

MARSHALL & WEHLE, Esqrs.,
Attorneys for Harold Palmer and others, as a Committee for 7% Guaranteed Stock of Manhattan Railway Company,
50 Broadway, New York City.

DAVIES, AUERBACH & CORNELL, Esqrs.,
Attorneys for Central Hanover Bank & Trust Company, as Trustee of the Manhattan Mortgage,
1 Wall Street, New York City.

DILLS, MUECKE & SCHELKER, Esqrs.,
Attorneys for Manhattan Railway Company,
1 Pershing Square, New York City.

MILBANK, TWEED, HOPE & WEBB, Esqrs.,
Attorneys for Chase National Bank of the City of New York, as Trustee under Second Mortgage of Manhattan Railway Company,
15 Broad Street, New York City.

Doc. 49a

Petition of Central Hanover Bank and Trust Company, as Trustee, to Make Receivers Parties Defendant to Bill of Complaint.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1271

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity sitting:

1272 Central Hanover Bank and Trust Company, a corporation organized and existing under the laws of the State of New York, respectfully shows:

FIRST: Petitioner is the Trustee under Consolidated Mortgage of Manhattan Railway Company, dated February 26, 1890, to secure an issue of bonds now outstanding in the aggregate principal amount of over $40,000,000.00 and constituting a lien upon certain of the property now in possession of the Receivers appointed in the above-entitled cause.

SECOND: Default has occurred on the part of Manhattan Railway Company in respect of certain of the provisions of said Consolidated Mortgage and petitioner intends to file in this Court its bill of complaint to enforce the rights of itself and of the holders of bonds and coupons secured by said Consolidated Mortgage. The Receivers appointed by this Court in the above-entitled cause of the property, respectively, of Interborough Rapid Transit Company and Manhattan Railway Company, have an interest in the subject-matter of your petitioner's proposed bill of complaint and have a right to be heard in respect thereof and are or may be necessary parties to said bill of complaint.

WHEREFORE, petitioner prays that leave be granted to it to make the said Receivers parties defendant to its said proposed bill of complaint.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee,
By F. J. FULLER,
Vice-President,
Petitioner.

(Seal)

Attest:

J. T. HARRIGAN,
Assistant Secretary.

DAVIES, AUERBACH & CORNELL,
Solicitors for Petitioner.

EDWARD CORNELL,
H. C. MCCOLLOM,
of Counsel.

Doc. 50

Answer of Receiver of Manhattan Railway Company to the Petition of the Receivers of the Interborough Rapid Transit Company, Verified September 28, 1932.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1277 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. — In Equity E 70-364

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, In Equity Sitting:

WILLIAM ROBERTS, Receiver of Manhattan Railway Company, does hereby make answer to the petition (hereinafter
1278 sometimes called the "petition") of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of the Interborough Rapid Transit Company (hereinafter sometimes called the "Receivers"), verified and filed herein on September 28, 1932, as follows:

I. He admits the execution of the lease and contracts referred to in paragraphs 1 to 8, inclusive, and 11, 14, 15 and 16 of the petition, and that the allegations with respect to said transactions made in said paragraphs are in most respects true and correct, but for a full statement

of the contents and effect of said instruments begs leave to refer to the same or true copies thereof.

II. Answering paragraph 9 of the petition, he does not now question the figures alleged therein, but asks that they be deemed to be subject to subsequent verification.

III. Answering paragraph 10 of the petition, he denies, on information and belief, that the earning power of the Manhattan Division was reduced solely because of the longer passenger haul involved in the operation of these lines and the increase in operating costs which followed the World War, and alleges that the chief cause of such reduction was the making by Interborough Rapid Transit Company of an agreement with the City of New York on March 19, 1913, which, as construed by the courts, obligated the Interborough Company to operate the lines leased from the Manhattan Railway Company, as well as the subway lines, at a five-cent fare. Further answering said paragraph, he denies, on information and belief, that upon proper principles of accounting the losses on the operation of the Manhattan Division for the first five years after operation commenced on July 1, 1917, would have been in the amounts therein set forth.

IV. Answering paragraph 12 of the petition, he is without knowledge as to the allegation therein contained that, following the adoption of the 1922 Plan, the Elevated actually carried 180,500,000 less passengers than was estimated in 1921; he does not now question the other figures contained in said paragraph as to the number of passengers carried during the fiscal years ended June 30, 1922, to 1932, inclusive, but denies the conclusion therein stated that the volume of traffic has progressively and consistently declined, it appearing that such volume has been remarkably consistent until the years 1931 and 1932,

1282 when, as he is informed and believes, it was affected by the general business depression.

V. Answering paragraphs 12-a, 12-b and 12-c of the petition, he denies, on information and belief, that deficits in the amounts therein stated would have occurred if proper accounting methods had been employed in determining the income of the Manhattan Division; he further alleges that the figures set forth in said paragraph 12-a for the years ended June 30, 1923, to 1928, inclusive, do not afford an accurate comparison with the later years, in that there are included, as he is informed and believes, 1283 in the losses for the years ended June 30, 1923, to 1928, inclusive, amounts either paid or set up upon account of dividend rentals on modified stock of the Manhattan Railway Company aggregating approximately $15,000,000.

VI. He admits the allegations contained in paragraph 13 of the petition.

VII. He denies on information and belief that the Receivers of the Interborough Rapid Transit Company have not had sufficient time to make as complete an investigation as may be necessary to enable them to make representations to the Court with respect to the proper action to be taken by them in connection with the payment of 1284 the sums referred to in said paragraph 13 of the petition.

WHEREUPON William Roberts as such Receiver, having answered the said petition, affirmatively further alleges as follows:

VIII. He avers that the allegations and all of them contained in the said petition of the Receivers of the Interborough Rapid Transit Company are insufficient to justify and delay in the payment by said Receivers of the amounts referred to in paragraph 13 of the petition.

IX. On September 28, 1932, he made application herein upon his petition verified that day for an order directing the Receivers of the Interborough Rapid Transit Company to pay the interest due October 1, 1932, upon the Consolidated Mortgage Bonds of Manhattan Railway Company and taxes due and payable in respect to properties of the Manhattan Railway Company, without prejudice to any subsequent application or any further relief in the premises, and he refers to the allegations in said petition setting forth the facts and reasons which he deems to require such an order, with the same effect as if the same were herein set forth at length.

X. Under date of March 19, 1913, Interborough Rapid Transit Company entered into three agreements with the City of New York, one of which, known as Contract No. 3, provided for the construction of additional subways and the operation thereof by Interborough Rapid Transit Company, another related to the construction by Interborough Rapid Transit Company of extensions to the lines of railroad owned by Manhattan Railway Company, and the third related to trackage rights granted by the City of New York to Interborough Rapid Transit Company over lines of railroad constructed pursuant to Contract No. 3; said contracts are public documents and are hereby incorporated by reference and made a part hereof. Said contracts were entered into by the Interborough Rapid Transit Company to provide a dual system of rapid transit throughout the City of New York by subways and elevated railroads.

XI. Contract No. 3, relating to the subways, has proven to be profitable to Interborough Rapid Transit Company solely by reason of the fact that under said contract Interborough Rapid Transit Company is given a large preferential payment out of the earnings of the subways before any payments are made to the City of New York in return

for its large investment in the subways. Moreover, the operating expenses of the subways are not burdened with heavy taxes. For the year ended June 30, 1932, the taxes charged against the operating revenue of the Subway Division were $445,706 as against $1,931,736 charged against the Elevated Division.

XII. The elevated lines contribute their fair proportion to the gross revenues obtained by the Interborough Rapid Transit Company and its Receivers from the operation of the dual system of rapid transit. No decision has
1289 been reached by the Receivers as to whether they will recommend the separation of the elevated lines from the subway division. At least until a plan to that end shall have been formulated by the Receivers of the Interborough Rapid Transit Company, they should use the gross revenues obtained from the operation of both systems in a manner which is fair and equitable to the holders of securities of both Manhattan Railway Company and Interborough Rapid Transit Company.

XIII. The mortgage of Manhattan Railway Company carries only four per cent. interest charges, has no sinking fund requirements and does not mature until 1990. The Receivers of the Interborough Rapid Transit Company owe a duty to Manhattan Railway Company to protect it
1290 from the irreparable loss which is threatened by the continuance of the default under that mortgage.

XIV. This Receiver of Manhattan Railway Company does not, by anything in this answer or in his petition of September 28, 1932, waive or acquiesce in the failure on the part of the Interborough Rapid Transit Company or its Receivers to comply in full with all of the provisions of the lease of the properties of the Manhattan Company to the Interborough Company. He asks for the payment of the bond interest and taxes aforesaid as a measure im-

mediately required, but only upon condition that it is without prejudice to the right of the Manhattan Company and his right as Receiver to full performance of all the terms and conditions of said lease.

WHEREFORE, William Roberts, as such Receiver, respectfully asks that this Court instruct the Receivers of the Interborough Rapid Transit Company in accordance with the prayers in his own petition, above referred to, verified September 28, 1932, and in this answer.

WILLIAM ROBERTS,
Receiver of Manhattan Railway Company.

HUGHES, SCHURMAN & DWIGHT,
Solicitors for William Roberts, Receiver,
100 Broadway, New York City.

Doc. 51

Answer of The American Brake Shoe and Foundry Company, Plaintiff in this Cause, to the Petition of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers for Defendant, Filed September 28, 1932.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1295

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

The American Brake Shoe and Foundry Company, plaintiff in this cause, for answer to the petition of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers for defendant, filed herein on September 28, 1932, praying, among other things, for instructions from the Court with
1296 respect to the payment of certain rentals under lease from Manhattan Railway Company, or unto so much and such parts thereof as plaintiff is advised it is necessary or material for it to make answer, answering says:

FIRST: Plaintiff admits the allegations contained in paragraphs 1 to 8, inclusive, of the petition.

SECOND: Plaintiff admits the allegations contained in paragraph 9 of the petition, except that it is without

knowledge with respect to the particular securities representing the capital expenditures and capital moneys referred to in said paragraph and with respect to the amount of debt service referred to therein.

THIRD: Plaintiff is without knowledge with respect to any of the allegations contained in paragraph 10 of the petition.

FOURTH: Plaintiff admits the allegations contained in paragraph 11 of the petition.

FIFTH. Plaintiff is without knowledge with respect to any of the allegations contained in paragraphs 12 to 12c, inclusive, of the petition.

SIXTH: Plaintiff admits the allegations contained in paragraph 13, except that plaintiff is without knowledge with respect to any demand from Manhattan Railway Company that defendant pay certain taxes or deposit the amount thereof in a bank or trust company; that Manhattan Railway Company and its Receiver gave any notice and demand to defendant's Receivers with respect to a quarterly installment of Federal income taxes of Manhattan Railway Company nor as to the amount of such installment.

SEVENTH: Plaintiff admits the allegations contained in paragraphs 14, 15, 16 and 17 of the petition.

EIGHTH: Further answering the petition, plaintiff avers upon information and belief that the Receivers of defendant have made no election with respect to the adoption or the rejection of the lease by defendant of the properties of Manhattan Railway Company referred to in the petition, and that the payment by the Receivers of rent under said lease, in so far as such rent would cover the use of properties of Manhattan Railway Company by

defendant prior to the appointment of the Receivers of defendant, would, in the event of the rejection of said lease, constitute a preferential payment to or for the account of one general creditor of defendant and would be prejudicial to the rights of all of the other creditors of defendant.

WHEREFORE, plaintiff prays that the Receivers of defendant be instructed to make no payments by way of rental under the lease of Manhattan Railway Company unless and until said lease shall have been adopted.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
By E. B. SIBBALD,
Assistant Secretary.

BREED, ABBOTT & MORGAN,
Solicitors for Plaintiff,
15 Broad Street,
New York, N. Y.

Doc. 52

Answer of The American Brake Shoe and Foundry Company, Plaintiff in this Cause, to the Petition of William Roberts, Receiver of Manhattan Railway Company, Filed September 28, 1932.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

The American Brake Shoe and Foundry Company, plaintiff in this cause, for answer to the petition of William Roberts, Receiver of Manhattan Railway Company, filed herein on September 28, 1932, asking for an order directing the Receivers of Interborough Rapid Transit Company to pay on October 1, 1932, the interest due upon the first mortgage bonds of Manhattan Railway Company and to pay taxes which are due and payable with respect to properties of Manhattan Railway Company, or unto so much and such parts thereof as plaintiff is advised it is necessary or material for it to make answer, answering, says:

FIRST: Plaintiff admits the allegations contained in Paragraphs I to V, inclusive, of the petition.

306 *American Brake Shoe Record.*
Answer of Complainant to Petition.

SECOND: Answering Paragraph VI, plaintiff avers upon information and belief that Manhattan Railway Company has a period of sixty days' grace after October 1, 1932, within which to make payment of the interest on the consolidated mortgage 4% bonds of Manhattan Railway Company referred to in said petition; and that interest on the second mortgage 4% bonds of Manhattan Railway Company referred to in said petition does not become due until the 1st day of December, 1932; and avers that it is without knowledge as to whether a failure to make the interest and tax payments referred to in said Paragraph VI would
1307 lead to any of the consequences therein averred.

THIRD: Answering Paragraph VII, plaintiff admits the allegations therein contained except that it avers that it is without knowledge as to whether the petitioner has any way of providing funds necessary to remedy the default and meet the bond interest therein referred to except by the application to this Court set forth in said petition.

FOURTH: Answering Paragraphs VIII, IX and X, plaintiff is without knowledge with respect to the allegations therein contained.

FIFTH: Answering Paragraph XI, plaintiff admits that the cost to Interborough Rapid Transit Company of the
1308 elevated extensions, third tracks and power plant improvements has not been in excess of $45,000,000, and that the investment by Interborough Rapid Transit Company in the third tracks and power house improvements upon Manhattan Railway Company property is not less than $27,000,000, but avers that it is without knowledge with respect to the other allegations contained in said paragraph.

SIXTH: Answering Paragraph XII, plaintiff is without knowledge with respect to the allegations therein contained.

SEVENTH: Answering Paragraph XIII, plaintiff is without knowledge with respect to the allegations contained in said paragraph, except that it admits that by the agreement made by Interborough Rapid Transit Company with the City of New York in 1913, as construed by the courts, Interborough Rapid Transit Company agreed to operate the elevated railroads constructed pursuant to the elevated certificates, together with the lines leased from Manhattan Railway Company, for a five-cent fare.

EIGHTH: Answering Paragraphs XIV and XV, plaintiff admits the allegations therein contained.

NINTH: Answering Paragraph XVI, plaintiff is without knowledge with respect to the allegations therein contained.

TENTH: Answering Paragraph XVII, plaintiff denies each and every allegation therein contained.

ELEVENTH: Further answering the petition, plaintiff avers upon information and belief that the Receivers of Interborough Rapid Transit Company have made no election with respect to the adoption or the rejection of the lease by defendant of the properties of Manhattan Railway Company referred to in the petition, and that the payment by the Receivers of rent under said lease in accordance with the prayer of said petition, in so far as such rent would cover the use of the properties of Manhattan Railway Company by defendant prior to the appointment of the Receivers of defendant, would, in the event of the rejection of such lease, constitute a preferential payment to or for the account of one general creditor of defendant and would be prejudicial to the rights of all of the other creditors of defendant.

1312 *American Brake Shoe Record.*
Answer of Complainant to Petition.

WHEREFORE, plaintiff prays that said petition be dismissed.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
By E. B. SIBBALD,
Assistant Secretary.

BREED, ABBOTT & MORGAN,
Solicitors for Plaintiff,
15 Broad Street,
New York, N. Y.

1313

1314

Doc. 53

Notice of Motion on Petition of Central Hanover Bank and Trust Company, as Trustee, for Payment of Taxes and Interest, Segregation of Income and Other Relief.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

AMERICAN BRAKE SHOE & FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

Sirs:

PLEASE TAKE NOTICE that upon the petition verified October 3, 1932, and hereto attached of Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company, we shall move this Court on Monday, October 3, 1932, at 3 o'clock P. M., or as soon thereafter as counsel can be heard, at Room 439, in the Old United States Post Office Building, Broadway and Park Place, Borough of Manhattan, City of

New York, for an order granting the relief prayed for in said petition.

Dated, New York, October 3, 1932.

Yours, etc.,

DAVIES, AUERBACH & CORNELL,
Solicitors for Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company,
Office and Post Office Address,
No. 1 Wall Street,
Borough of Manhattan,
New York City.

To:

Messrs. Breed, Abbott & Morgan,
Solicitors for Complainant,
15 Broad Street, New York City.

James L. Quackenbush, Esq.,
Solicitor for Defendant,
65 Broadway, New York City.

Messrs. Chadbourne, Stanchfield & Levy,
Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company,
25 Broadway, New York City.

Messrs. Davis, Polk, Wardwell, Gardiner & Reed,
Solicitors for Committee of Interborough Rapid Transit Company 10-Year Secured Convertible 7% Gold Notes due September 1, 1932, and for Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966, and for Guaranty Trust Company of New York as Trustee under said Mortgage,
15 Broad Street, New York City.

American Brake Shoe Record.
Notice of Motion of Trustee for Payments.

Messrs. Root, Clark & Buckner,
Solicitors for Committee for Interborough Rapid Transit Company 10-Year 6% Gold Notes due October 1, 1922,
31 Nassau Street, New York City.

Messrs. Dills, Muecke & Schelker,
Solicitors for Manhattan Railway Company,
1 Pershing Square, New York City.

Messrs. Hughes, Schurman & Dwight,
Solicitors for William Roberts, Receiver of Manhattan Railway Company,
100 Broadway, New York City.

Messrs. Cotton, Franklin, Wright & Gordon,
Solicitors for Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Gold Bonds,
63 Wall Street, New York City.

Messrs. Milbank, Tweed, Hope & Webb,
Solicitors for Chase National Bank of the City of New York as Trustee under Second Mortgage of Manhattan Railway Company,
15 Broad Street, New York City.

Messrs. Marshall & Wehle,
Solicitors for Protective Committee for 7% Guaranteed Stock of Manhattan Railway Company,
50 Broadway, New York City.

Doc. 53

Petition of Central Hanover Bank and Trust Company, as Trustee, for Payment of Taxes and Interest, Segregation of Income and Other Relief.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1325

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity
E 70-364.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity Sitting:

1326 The petition of Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, hereinafter mentioned, respectfully shows:

1. This petitioner, on September 19, 1932, filed in this Court a certain petition praying for an order permitting it to intervene herein and making it a party hereto; and upon said petition an order was made by this Court and filed herein on said date, granting the relief prayed for in said petition. By said petition it appears that under a

mortgage made by Manhattan Railway Company (hereinafter termed Manhattan), dated February 26, 1890, as supplemented by a certain indenture supplemental thereto, dated June 13, 1899 (said mortgage as so supplemented being herein termed the Consolidated Mortgage), under which this petitioner is the Trustee, there are secured certain bonds aggregating in principal amount $40,683,000, dated April 1, 1890, and payable April 1, 1990, with interest at the rate of four per cent. (4%) per annum, payable semi-annually on October 1st and April 1st in each year. To said petition and order petitioner prays reference and makes the same a part hereof. Petitioner also prays reference to, and makes a part hereof, the bill of complaint in the above entitled cause, dated and filed herein on August 26, 1932, the answer thereto of Interborough Rapid Transit Company (hereinafter termed Interborough), filed on the same date, the order appointing Victor J. Dowling and Thomas E. Murray, Jr. (hereinafter termed the Interborough Receivers), as Receivers of the property of Interborough dated and filed herein on the same date, the petition of Manhattan dated and filed herein on September 2, 1932, asking that it be made a party defendant and for other relief, and the order dated and filed herein on September 6, 1932, appointing William Roberts (hereinafter termed the Manhattan Receivers), as Receiver of the property of Manhattan.

2. On September 28, 1932, this petitioner filed in this Court its bill of complaint for the impounding of the tolls, income, rents, issues and profits of the property covered by said Consolidated Mortgage and for other relief, a copy of which bill of complaint (without exhibits thereto) is annexed hereto as Exhibit A and made a part hereof. The exhibits annexed to said bill of complaint are the above-mentioned mortgage of February 26, 1890, and the indenture supplemental thereto, originals or true copies of which will be produced upon the hearing hereof.

330 *American Brake Shoe Record.*
Petition of Trustee for Payment of Taxes, Etc.

3. Under the Lease from Manhattan to Interborough, dated January 1, 1903, and referred to in petitioner's said bill of complaint, under which substantially all of the property of Manhattan was held by Interborough until the Interborough Receivers took possession thereof, Interborough agreed to make various payments, as provided in said Lease, including among other things the payment of taxes upon the demised premises and the payment of the interest on the bonds secured by said Consolidated Mortgage.

By the bill of complaint in the above-entitled cause it is alleged, and by the answer of the defendant Inter-
331 borough therein it is admitted, that certain taxes amounting with interest to over $860,000 have been duly assessed by the City of New York against special franchises and real estate belonging to Manhattan, and that said taxes have not been paid although due and payable in May, 1932, and Manhattan on June 22, 1932, notified Interborough that said special franchise taxes and real estate taxes amounting to upwards of $780,000 were due and payable on May 31, 1932, and has demanded that they be paid. The failure to pay said taxes constitutes a default under the Consolidated Mortgage by virtue of which the Trustee thereunder is empowered to foreclose said Consolidated Mortgage or to take other remedies for the enforcement thereof, and the principal of all of the bonds
332 outstanding under and secured by said Consolidated Mortgage may at any time be declared due and payable. The failure of Interborough to pay the said taxes constitutes a default under the said Lease, by virtue of which, at the expiration of ninety days after the demand heretofore made by Manhattan upon Interborough dated June 22, 1932, the said Lease may be terminated.

4. Petitioner is advised and believes and therefore alleges that by the filing of its aforesaid bill of complaint on September 28, 1932, the tolls, income, rents, issues and

profits of the mortgaged property were impounded as of the date of the filing thereof. As appears from said bill of complaint, there is held by the Interborough Receivers, under the said Lease from Manhattan to Interborough, substantially all the property of Manhattan, all of which property, as plaintiff is advised and believes, is subject to the prior lien of the Consolidated Mortgage. If this Court has the power to order the rejection of said Lease, the said Lease may hereafter be adopted or rejected; but while default exists under the Consolidated Mortgage in the payment of the taxes due in May, 1932, or otherwise exists, petitioner is entitled to have impounded, and it has impounded as of September 28, 1932, the tolls, income, rents, issues and profits of the mortgaged premises. The said impounding does not affect in any way the said Lease. If all payments under the Lease shall be made and all defaults under the said Consolidated Mortgage shall be duly cured, the lien of the Consolidated Mortgage upon the said tolls, income, rents, issues and profits will be released. If the Lease shall be rejected the minimum amount which, as alleged in said bill of complaint, will be payable by the Interborough Receivers for the period of their possession of the leased property, will be the net earnings, properly to be computed, thereof. Petitioner is advised and believes, and therefore alleges, that during continuance of default under the Consolidated Mortgage and pending the adoption or rejection of the lease, petitioner is entitled to have impounded, and has impounded, the tolls, income, rents, issues and profits of the mortgaged premises, subject only to such expenses as may lawfully and properly be incurred in the operation and preservation of said property, having due regard for the rights of petitioner and of the holders of the bonds and coupons secured by the Consolidated Mortgage and for the protection of the security for said Consolidated Mortgage. Petitioner is advised and believes and therefore alleges that for the proper protec-

tion of its rights and the rights of the holders of the bonds and coupons secured by said Consolidated Mortgage, it is entitled to be safeguarded against the use of the net earnings (which term as used herein is the equivalent of the term "Gross Income" as used in the Uniform System of Accounts hereinafter mentioned) from the mortgaged property in any way other than by the holding of the same (1) so long as default exists under the Consolidated Mortgage, subject to the lien of the Consolidated Mortgage, or (2) while such default does not exist but default exists under the Lease, for the account of the Manhattan
337 Receiver; that it would be most inequitable and improper that the said net earnings should be held as a part of the general funds of the Interborough Receivers and subject to their use; and that the only way by which the rights of petitioner and of the holders of the bonds and coupons secured by the Consolidated Mortgage can be adequately and properly protected is by the segregation, in a separate account, of said net earnings of the Manhattan property, subject, while default exists under the Consolidated Mortgage, to the prior lien of said mortgage and subject to the payment over, at such times as the Court may direct, of the balance in said account to the receiver when appointed under petitioner's said bill of complaint, and until that time to the Manhattan Receiver, and/or any other receiver appointed of the property of Manhattan, subject to the
338 prior lien of the said Consolidated Mortgage and subject, also, to the non-use of any said moneys so paid over until further order of the Court. Nothing in petitioner's said bill of complaint or herein contained is intended to affect, or does affect, the said Lease; but petitioner reserves the right, at any time, to apply to this Court for directions in respect of said Lease and/or the leased property or any part thereof or to take any other action in respect thereof or for the enforcement of its rights and the rights of the holders of the bonds and coupons secured by said Consoli-

dated Mortgage; and petitioner does not in any way waive its assertion that in the event of rejection or termination of said Lease the amounts payable by the Interborough Receivers, for the period of their possession of the Manhattan property, will largely exceed the net earnings of the Manhattan property.

5. By the above mentioned order, made by this Court herein on September 6, 1932, appointing the Manhattan Receiver, it was provided as follows:

> "And the said temporary Receivers of Interborough Rapid Transit Company are hereby directed to keep separate accounts with respect to the properties of Manhattan Railway Company so that the rents, issues and profits from such properties may be segregated."

Some time may elapse before it will be practicable to determine the rents, issues and profits from the Manhattan property, inasmuch as said property is now operated, and its income is accounted for and reported, in conjunction with other properties, constituting with the Manhattan property the so-called "Interborough Rapid Transit Company-Elevated Division" mentioned in the reports of Interborough to the Transit Commission, and in various respects the accounts of Interborough are so kept that they fall far short of reflecting the true net earnings of Manhattan. Pending the time when it shall be practicable to properly determine said net earnings or even to set up a basis upon which Manhattan net earnings can be provisionally segregated, your petitioner prays that the segregation be upon the basis stated in the prayers for relief hereinafter contained, but without prejudice to petitioner's assertion that the net earnings of Manhattan should be promptly segregated upon a proper basis.

1342 *American Brake Shoe Record.*
Petition of Trustee for Payment of Taxes, Etc.

6. On October 1, 1932, there became due and payable under said Lease the sum of $813,660, being the semi-annual installment of interest due on that date at the rate of 4% per annum on the $40,683,000 in principal amount of bonds secured by said Consolidated Mortgage. Failure to make the said payment on October 1, 1932, will result simultaneously in another default under the Consolidated Mortgage, giving to petitioner and to the holders of bonds and coupons secured by said mortgage the rights and remedies therein provided for or otherwise afforded by the law. Petitioner prays that the Interborough Receivers be directed forthwith to pay the taxes (with interest) im-
1343 posed against property of Manhattan and payable in May, 1932, and be directed to pay forthwith said installment of interest due October 1, 1932. Petitioner joins in the request made by the Manhattan Receiver, by petition herein dated September 28, 1932, that said taxes and interest be paid forthwith. Petitioner is advised and believes and therefore alleges that Interborough for many years had the benefit of and used large amounts of net profits accruing from the operation of the leased Manhattan property; that the Interborough Receivers are in possession of ample funds from which to pay said taxes and interest; and that said funds are free from any lien which would prevent the equitable disposition by this Court thereof to the extent herein prayed for. As petitioner is advised and believes
1344 and therefore alleges, it would be entirely premature to allow said taxes to continue in default and default to be created and continue in the payment of said mortgage interest in advance of a clear showing, which has not been made, that such default should be allowed, with the consequent immediate danger of disruption of the system, breach of contract of Interborough with the City of New York, loss by Interborough of any claim to the amounts expended by it upon Manhattan properties and the necessary elimination by foreclosure of the interests in the Manhattan property junior to the Consolidated Mortgage.

Furthermore, under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913, it is provided in Article Five, Section 2, that in case of the happening of one or more of the events therein called "events of default," the Trustee may exercise the remedies therein provided for, by way of entry, precipitation of principal, sale at public auction, foreclosure or other appropriate remedy—one of such "events of default" being defined in subdivision (g) of said Section 2 of Article Five as follows:

> "(g) Default in the payment of the rent reserved, or in any other payment required to be made, in the lease to the Interborough Company from Manhattan Railway Company, dated January 1, 1903, or in any agreement amendatory thereof or supplemental thereto, or in the performance of any other condition in said lease contained (the breach of which condition by the terms of said lease shall expose the Interborough Company to forfeiture or reentry), or in the payment of the interest upon any bonds of the Manhattan Railway Company hereafter issued with the consent of the Interborough Company,—any of which defaults shall have continued for the period of sixty days after written notice thereof from said Manhattan Railway Company or from the Trustee hereunder; provided that in good faith the existence of such default shall not be contested by the Interborough Company."

Your petitioner is advised and believes and therefore alleges that default in the payment of rent reserved under said lease, to wit, the taxes which became due and payable in May, 1932, has continued for the period of sixty days after written notice thereof from Manhattan given to Interborough on June 22, 1932. The foreclosure of said First and Refunding Mortgage would eliminate the in-

terests in the Interborough property junior to said mortgage.

Whether after the said taxes of May, 1932, and interest due October 1, 1932, have been paid the Interborough Receivers shall be directed to adopt the Lease or to make future payments under said Lease is, as petitioner is advised and believes, a question which may properly be determined upon a full presentation of all of the pertinent and most complicated facts; but this petitioner submits that to allow the said defaults to exist and continue permits the disruption of the system in advance of any showing whatever that this Court should permit such results.

1349

7. Petitioner is advised and believes and therefore alleges that certain of the interest which became due and payable on April 1, 1932, and prior thereto, on the bonds secured by said Consolidated Mortgage has not been paid by reason of the fact that when the Interborough Receivers were appointed and took possession of the Interborough property, as well as the property leased to Interborough by Manhattan, some of said interest had not been demanded; that the Interborough Receivers have in their hands funds very largely in excess of the amounts required to pay said interest; and that the Interborough Receivers should be directed as a matter of equity to make payment of said interest as and when the coupons representing the same shall be presented or payment of said interest shall be otherwise properly demanded.

1350

WHEREFORE, this petitioner prays (without effect upon the Lease from Manhattan Railway Company to Interborough Rapid Transit Company, dated January 1, 1903, and without prejudice to the right of petitioner to seek other, further or different relief, and without prejudice to any claim of petitioner to tolls, income, rents, issues and profits, of the property covered by the Consolidated Mort-

gage, for the period prior to the filing of its said bill of complaint on September 28, 1932):

(1) that the Interborough Receivers be directed forthwith to pay the taxes (with interest) imposed against any property of Manhattan Railway Company and heretofore due and payable and now unpaid, as well as the interest due October 1, 1932, upon the bonds secured by the Consolidated Mortgage of Manhattan Railway Company;

(2) that unless and until all defaults under the Consolidated Mortgage of Manhattan Railway Company be duly cured and while default exists under the Consolidated Mortgage, the present and any other receivers of the property of Interborough Rapid Transit Company be directed as soon as practicable to segregate and to hold in a separate account the Revenues, accruing on and after September 28, 1932, in or coming into their possession or control from the properties in their possession owned by Manhattan Railway Company—as Revenues are defined in the Uniform System of Accounts of Street and Electric Railways as prescribed by the Public Service Commission for the First District of the State of New York—now known as the Transit Commission (Department of Public Service, Metropolitan Division) of the State of New York—and from such account to pay, until further order of the Court, only such expenses as are defined in said Uniform System of Accounts as Operating Expenses and Taxes Assignable to Operation; and that until it shall be practicable so to segregate such Revenues of the Manhattan owned property, that the said receivers be directed to segregate and hold in a separate account such Revenues from the properties included in the reports of the Interborough Rapid Transit Company to the Transit Com-

mission under the heading "Interborough Rapid Transit Company—Elevated Division" (without prejudice to petitioner's prayer that the net earnings—or Gross Income as defined in said Uniform System of Accounts—of Manhattan Railway Company be promptly segregated upon the proper basis), and until further order of the Court to pay from such Revenues only such Operating Expenses and Taxes Assignable to Operation, and that at such time or times as this Court shall determine, the balance in said account be paid over to the receiver
1355 when appointed and qualified under the bill of complaint of this petitioner filed in this Court on September 28, 1932, but until such receiver shall be appointed and shall duly qualify, to William Roberts, as Receiver of the property of Manhattan Railway Company and/or such other or additional receivers of the property of Manhattan Railway Company as shall be duly acting as such, to be held by him or them in a separate account; and that this petitioner as Trustee as aforesaid shall have a first and prior lien upon all funds at any time in said account of any receiver of the property of Manhattan Railway Company, or in said account of any receiver of the property of Interborough Rapid Transit Company, subject to the payment there-
1356 from of such Operating Expenses and Taxes Assignable to Operation as aforesaid and subject to the non-use of any amounts so paid over to any receiver of any property of Manhattan Railway Company until the further order of this Court; and that in the event that all defaults under the Consolidated Mortgage of Manhattan Railway Company shall be duly cured, and while default shall not exist under the Consolidated Mortgage, then, unless and until the aforesaid Lease shall be adopted and all provisions thereof shall have been complied with by any

receivers of the property of Interborough Rapid Transit Company, the said Revenues be segregated and held in a separate account and held and applied as aforesaid, except that the question of the lien of the Consolidated Mortgage upon the moneys in any such account, while there shall be no default under the Consolidated Mortgage, be reserved for further order;

(3) that the Interborough Receivers be directed to pay all unpaid interest due April 1, 1932, and prior thereto, upon the bonds secured by the Consolidated Mortgage of Manhattan Railway Company upon presentation of the unpaid coupons evidencing such interest or upon other proper demand for said interest; and

(4) that the petitioner have such other and further relief as may be just and proper.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee,
By S. A. BROWN,
Vice-President.

Attest:

J. T. HARRIGAN,
Assistant Secretary.

(Corporate Seal)

....,
Petitioner.

DAVIES, AUERBACH & CORNELL,
Solicitors for Petitioner.

H. C. MCCOLLOM,
Of Counsel.

1360 *American Brake Shoe Record.*

Exhibit A.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, Plaintiff, against MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers of the property of Interborough Rapid Transit Company, WILLIAM ROBERTS, as Receiver of the property of Manhattan Railway Company, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under Second Mortgage of Manhattan Railway Company, and THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Defendants.	In Equity.

1361

1362 BILL OF COMPLAINT.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity Sitting:

Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage hereinafter mentioned, for its bill of complaint herein, alleges:

1. The plaintiff, Central Hanover Bank and Trust Company, under said name and under its prior names, was at

all the times hereinafter mentioned, and it still is, a corporation duly organized and existing under the laws of the State of New York, a citizen and resident of said State and a resident and inhabitant of the Southern District of New York; and at all of said times it was, and it still is, duly authorized and empowered under the terms of its charter to take and hold in trust the property granted, bargained, sold, conveyed and confirmed to it upon the trusts hereinafter stated, and to execute and perform the trusts upon it imposed under and by virtue of the terms and provisions of the Consolidated Mortgage hereinafter mentioned.

2. The defendant Manhattan Railway Company (hereinafter sometimes termed Manhattan), at all the times hereinafter mentioned was, and it still is, a corporation duly organized and existing under the laws of the State of New York, a citizen and resident of said State and a resident and inhabitant of the Southern District of New York.

3. Plaintiff is informed and believes and therefore alleges that the defendant Interborough Rapid Transit Company (hereinafter sometimes termed Interborough) is a corporation duly organized and existing under the laws of the State of New York, a citizen and resident of said State and a resident and inhabitant of the Southern District of New York.

4. Plaintiff is informed and believes and therefore alleges that the defendant Victor J. Dowling is a citizen and resident of the State of New York and a resident and inhabitant of the Southern District of New York.

5. Plaintiff is informed and believes and therefore alleges that the defendant Thomas E. Murray, Jr., is a citizen and resident of the State of New York and a resident and inhabitant of the Eastern District of New York.

1366 *American Brake Shoe Record.*
Exhibit A to Petition—Bill of Complaint.

6. Plaintiff is informed and believes and therefore alleges that the defendant William Roberts is a citizen and resident of the State of New York and a resident and inhabitant of the Southern District of New York.

7. Plaintiff is informed and believes and therefore alleges that the defendant The Chase National Bank of the City of New York is a corporation duly organized and existing under the laws of the State of New York, a citizen and resident of said State, and a resident and inhabitant of the Southern District of New York.

8. Plaintiff is informed and believes and therefore
1367 alleges that the defendant The American Brake Shoe and Foundry Company is a corporation duly organized and existing under the laws of the State of Delaware, a citizen and resident of said State, and a resident and inhabitant of said State, also resident in the Southern District of New York.

9. The ground upon which the jurisdiction of this Court depends is that in the bill of complaint filed in this Court on August 26, 1932, in the cause hereinafter referred to, brought by The American Brake Shoe and Foundry Company, Plaintiff, against Interborough Rapid Transit Company, Defendant, In Equity No. 70-364, the appointment was prayed for of a receiver of the property of Interborough, as well as the property of Manhattan
1368 which was leased to Interborough by lease dated January 1, 1903, and to which the present bill of complaint relates, and the defendant Interborough filed in said Court in said cause its answer admitting the allegations of the bill of complaint therein, and in said cause Manhattan, on September 2, 1932, filed its petition praying that it might become a party defendant to said cause and that the receivership therein be extended to the property of Manhattan; and also, this Court, on August 26, 1932, made an order appointing the defendants Victor J. Dowling

and Thomas E. Murray, Jr. (hereinafter termed the Interborough Receivers), as Receivers of the property of Interborough, including the property of Manhattan which was so leased to Interborough and to which the present bill of complaint relates, and thereafter said Interborough Receivers qualified and took possession of all of the aforesaid property and have since been and now are in possession of the same, and on September 6, 1932, this Court made an order appointing the defendant William Roberts (hereinafter termed the Manhattan Receiver) as Receiver of the property of Manhattan, and thereafter the said William Roberts qualified as Receiver of the property of Manhattan and has ever since been and now is in possession of its property and rights in so far as the same have not been and are not now in the possession of the Interborough Receivers. The amount in controversy in this suit exceeds $5,000.

10. Heretofore and on or about February 26, 1890, and prior to the execution and delivery of the mortgage hereinafter mentioned, Manhattan, being thereunto duly authorized by the laws of the State of New York and by and pursuant to resolutions duly adopted by its stockholders and its Board of Directors and for its due and proper corporate business, duly authorized the issuance and delivery of Consolidated Mortgage Gold Bonds of Manhattan (hereinafter termed the bonds) to an amount limited as in said mortgage provided, such bonds to be dated April 1, 1890, and to be payable April 1, 1990, with interest thereon from April 1, 1890, at the rate of 4% per annum, payable semi-annually on the 1st days of October and April in each year.

11. In pursuance of the aforesaid purposes, Manhattan and The Metropolitan Elevated Railway Company, a New York corporation (hereinafter termed Metropolitan), being thereunto duly authorized by the laws of the State

1372 of New York and by and pursuant to resolutions duly adopted by their respective stockholders and their respective Boards of Directors and for their due and proper corporate purposes respectively, and in order to secure payment of the principal and interest of said bonds and to secure the performance and observance of all the covenants and conditions contained in the mortgage hereinafter mentioned, duly made and executed under their respective corporate seals and delivered to the plaintiff (in its then name, Central Trust Company of New York), as Trustee, a mortgage known as the Consolidated Mortgage, dated February 26, 1890 (a copy of which mortgage is
1373 hereto annexed, marked "Exhibit A" and made a part hereof), wherein and whereby Manhattan and Metropolitan did grant, bargain, sell, convey and confirm unto the plaintiff, its successors and assigns, in trust, all property then owned or thereafter acquired by Manhattan or Metropolitan, described or of the nature mentioned in the granting clauses of the mortgage, and reference is hereby made to said granting clauses (set forth on pp. 8 to 22, both inclusive, of the copy of said mortgage annexed hereto as aforesaid) for a particular description of or mention of such property, with the same force and effect as if said granting clauses were herein set forth at length. Among the property described in said mortgage as thus granted, bargained, sold, conveyed and confirmed, is the following:

1374 "NOW, THEREFORE, THESE PRESENTS WITNESS, that the Manhattan Company and the Metropolitan Company, the parties hereto of the first part (in the following clauses described collectively as the Railway Companies), in consideration of the premises and of one dollar to each of them in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto the Trustee, its successors and assigns, all and singular their several and re-

spective estates, property, rights, titles, possession, claims and demands, including leasehold or other interests, of, in and to the said system of railroads and each and every part thereof, and all additions thereto and extensions thereof and other property, the same being described as follows:

The elevated railway beginning at Greenwich Street and Battery Place, thence over and across Battery Place to the edge of the Battery and State Street; thence over, through and along the Battery and State Street to Whitehall Street; thence over, through and along Whitehall Street to and including the connection with the South Ferry, Hamilton Avenue Ferry and Staten Island Ferry; thence over, through and along Whitehall Street to Front Street, with the cross-over and turn-out between State Street and Front Street; thence over, through and along Front Street to Coenties Slip; thence over, through and along Coenties Slip to Pearl Street; thence over, through and along Pearl Street, Hanover Square and Franklin Square to the New Bowery; thence over, through and along the New Bowery and Chatham Square to the Bowery; thence over, through and along the Bowery to Third Avenue; thence over, through and along Third Avenue to the terminus of said Railway at or beyond East One hundred and twenty-ninth Street; with the branches and turn-outs, from Chatham Square over, through and along Chatham Street to Park Row; thence over, through and along Park Row to Tryon Row to and including the connection with the East River Bridge; and from Third Avenue and East Thirty-fourth Street over, through and along East Thirty-fourth Street to and including the connection with the Thirty-fourth Street Ferry; and from Third Avenue and East Forty-second Street over, through and along

East Forty-second Street to and including the connection with 'The Grand Central Depot'; Also the elevated railway beginning at Greenwich Street and Battery Place, from and including the connection with the railway above described, over, through and along Greenwich street to Ninth avenue; thence over, through and along Ninth avenue to One Hundred and Tenth street; thence over, through and along One Hundred and Tenth street to Eighth avenue; thence over, through and along Eighth avenue to the Harlem River, including the connection at or about One Hundred and Fifty-fifth street with the line of railway now or late of the New York City and Northern Railway Company; Also the elevated railway beginning at or about Morris street from and including the connection with the railway last above desscribed over, through and along New Church street and Church street to Murray street; thence over, through and along Murray street to College Place; thence over, through and along College Place, Chambers street, West Broadway and South Fifth avenue to Third street; thence over, through and along Third street to Sixth avenue; thence over, through and along Sixth avenue to Central Park, with a branch and turnout from Sixth avenue and West Fifty-third street over, through and along West Fifty-third street to and including the connection with the railway last above described; Also, the elevated railway beginning at Chatham Square from and including the connection with the railway first above described over, through and along Division street, Allen street and First avenue to Twenty-third street; thence over, through and along Twenty-third street to Second avenue; thence over, through and along Second avenue to the terminus of said railway at or about One Hundred and Twenty-ninth street; and all sidings, switches,

crossovers, turnouts and additional tracks forming part of the said railways; and any and all other railway now held by said Railway Companies or either of them or that they or either of them, their successor or successors, may hereafter acquire, whether by construction, purchase, lease, merger, consolidation or otherwise, together with all real estate and personal or other property in any way appertaining thereto.

Including in and as part and parcel of the premises hereby mortgaged, all present and future stations, station houses, engine houses, car houses, freight houses, wood houses, water and coal stations and other buildings, coal-yards, repair, machine and other shops, telegraph, signal and switching apparatus, third and other additional tracks, columns, girders, and supports of said railways, or of any part of them, and the rights, interests and estates of said Railway Companies and of each of them of, in and to the land over or upon which the same may stand; and also all present and future locomotives, stationary and other engines, tenders, cars and other rolling stock, equipment, furniture, machinery, tools, implements, fuel and material, acquired or to be acquired for the purposes of constructing, operating, repairing or replacing the said railways or of any part of them; and all tenements, hereditaments and appurtenances unto said railways or either of them belonging or in anywise pertaining, and all reversion and reversions, remainder and remainders, tolls, income, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well at law as in equity, of said Railway Companies or of either of them, of, in and to the said railways, and to each and every part and parcel thereof, with the appurtenances.

Also all rights, powers, franchises, licenses, easements and privileges of every description now held or that may hereafter be held or acquired by said Railway Companies or either of them, their successors and successor."

12. The said mortgage was duly executed, acknowledged and delivered in all respects in conformity with law and plaintiff in its then name, Central Trust Company of New York, duly accepted the trusts created in and by said mortgage before the recording of the same and the same was thereafter duly recorded in the office of the Register of the County of New York in Liber 2538 of Mortgages, page 157, on the 26th day of February, 1890.

13. At the time of the execution and delivery of said mortgage an agreement had been made between Manhattan and Metropolitan for the surrender of the capital stock of Metropolitan and the merger of Metropolitan into Manhattan, but said merger proceedings had not been completed, so that the property of Metropolitan was not then fully owned by Manhattan and therefore Metropolitan joined in said mortgage; but on or about May 7, 1894, the merger of Metropolitan and its properties into Manhattan was fully consummated and thereafter all property of Metropolitan was the property of Manhattan and subject to the aforesaid mortgage with the same force and effect as if owned by Manhattan at the date of said mortgage. Under the provisions of said mortgage, certain bonds were to be issued thereunder in exchange for certain First Mortgage Bonds and Second Mortgage Bonds of Metropolitan, and said exchange has long since been completed and Metropolitan has no interest in the subject-matter hereof.

14. Heretofore and on or about June 13, 1899, and prior to the execution and delivery of the indenture next mentioned, Manhattan, pursuant to due and lawful authority

and to due corporate action of its stockholders and its Board of Directors, duly made and executed under its corporate seal and delivered to plaintiff (in its then name, Central Trust Company of New York) an indenture supplemental to the aforesaid mortgage, by which supplemental indenture dated June 13, 1899 (a copy of which is hereto annexed marked "Exhibit B" and made a part hereof), the provisions of said mortgage were modified to permit the issuance of registered bonds (said mortgage as supplemented by said supplemental indenture being the Consolidated Mortgage under which since June 13, 1899, plaintiff has been acting and is now acting as Trustee). The said supplemental indenture was duly executed, acknowledged and delivered in all respects in conformity with law and plaintiff (in its then name, Central Trust Company of New York) duly accepted the trusts created in and by said supplemental indenture before the recording of the same, and said supplemental indenture was thereafter duly recorded in the office of the Register of the County of New York in Block Series Liber 7, General Mortgages, page 265, on the 12th day of July, 1899.

15. Plaintiff, as the result of proceedings duly taken pursuant to the statutes of the State of New York, and in connection with the merger into Central Trust Company of New York of Union Trust Company of New York, a New York banking corporation, duly changed its name from Central Trust Company of New York to Central Union Trust Company of New York, effective June 18, 1918, and subsequently and effective May 15, 1929, in connection with the merger of The Hanover Bank of the City of New York, a New York banking corporation, into said Central Union Trust Company of New York, plaintiff duly changed its name to Central Hanover Bank and Trust Company, and since said last mentioned date it has been doing business under the last mentioned name. Plaintiff under its prior names and under its present name continuously has been and it now is acting as the Trus-

tee, at first under the aforesaid mortgage, until supplemented as aforesaid, and thereafter under said Consolidated Mortgage.

16. Subsequent to February 26, 1890, and prior to the date of filing this bill of complaint, plaintiff as Trustee, at first under the aforesaid mortgage and then under the Consolidated Mortgage and in conformity with the terms thereof, did duly authenticate $40,676,000 principal amount of bonds in the form provided for in the Consolidated Mortgage, all of which bonds had been theretofore duly executed by Manhattan pursuant to due
391 corporate action and authority of law. Each and all of said bonds were duly delivered by the plaintiff and were duly issued with the appurtenant coupons and are now outstanding and have since been, and now are, the lawfully created, valid and existing obligations of Manhattan in the hands of *bona fide* holders thereof for value and secured by the aforesaid Consolidated Mortgage. In addition, there are held by plaintiff, as Trustee under the Consolidated Mortgage, $7,000 in principal amount of said bonds for delivery in exchange for a like amount of outstanding Registered Bond Certificates of Manhattan, as provided in said Consolidated Mortgage.

17. In and by the granting clauses of the aforesaid
392 mortgage, there were granted, bargained, sold, conveyed and confirmed unto the Trustee the "tolls, income, rents, issues and profits" of the mortgaged property.

18. In and by said mortgage, Manhattan covenanted and agreed, in Article Ninth thereof, as follows (the "Railway Companies" therein mentioned being Manhattan and Metropolitan herein):

> "NINTH.— * * * Until the interest and principal of said bonds shall be fully paid, said Railway Companies, their successor and successors,

shall promptly pay all taxes, assessments or other like charges lawfully laid, charged or imposed upon the mortgaged premises or any part thereof, including the property represented by any stocks, bonds or other like muniments or evidence of ownership deposited with or held by the Trustee as aforesaid, which may become prior to the lien of these presents; and that upon default by the said Railway Companies, or either of them, to pay any taxes, assessments or other like charges assessed or laid upon them, or either of them, or upon their property, whereby the lien of these presents might become impaired, the Trustee may, if so advised, and without impairment of or prejudice to any of its rights under this mortgage by reason of such default, itself pay the said taxes, assessments or other like charges, and have a lien upon the mortgaged premises for its advances for that purpose."

19. In and by said mortgage it was provided, in Articles First, Second, Third and Fourth, in part as follows:

"FIRST.—That until default in the payment of any interest or principal of the bonds hereby secured or of any of them, or until default by the Railway Companies or either of them, in some act or thing herein required to be kept, done or performed by them or either of them, they shall possess, use and enjoy the premises hereby mortgaged and have and receive the rents, issues and profits thereof.

"SECOND.—That upon any and every default in the payment of any interest of the bonds hereby secured, or of any of them, as and when the same shall fall due, and the continuance of such default for sixty days, or upon any and every default by said Railway Companies or either of them in any other act or thing herein required to be kept, done or performed by them or either of them, then and

in every such case the Trustee may, and upon the request in writing of the holders of a majority in amount of the bonds hereby secured at the time outstanding, and upon being indemnified to its satisfaction against all costs and expenses of compliance with such request, the Trustee shall, enter upon and take possession of and hold, use, occupy, operate and enjoy the premises hereby mortgaged and each and every part thereof, and receive the rents, issues and profits thereof, and said Railway Companies shall permit and suffer the same, and the Trustee, after first paying thereout its expenses
1397 of such entry, use, occupation, operation and enjoyment, including all taxes and other like charges and the cost of all repairs, betterments and improvements in its judgment necessary and expedient, and a reasonable compensation to the Trustee, shall apply the balance thereof to the satisfaction of any and all interest upon the bonds hereby secured at the time in default or accruing during such occupation, in the order in which the coupons therefor shall have matured, but without preference of one coupon over another of the same due date, and upon payment of all such arrears of interest shall restore possession of the mortgaged premises to the Manhattan Company, together with
1398 any surplus of such rents, issues and profits then remaining, to be by it held subject to this mortgage.

"THIRD.—That upon any and every such default in the payment of any interest of the bonds hereby secured or of any of them, and its continuance as aforesaid, or upon any and every such default by said Railway Companies or either of them in any other act or thing herein required to be kept, done or performed by them or either of them, the holders of a majority in amount of the bonds hereby secured at the time outstanding may, by writing to be delivered to the Trustee, declare the principal

of all the bonds hereby secured to be, and the same shall thereupon become, immediately due and payable; and upon any and every such default in the payment of any interest of the bonds hereby secured, or of any of them and its continuance as aforesaid, or upon any and every default in the payment of the principal of any of the bonds hereby secured as herein provided, or upon any and every such default by said Railway Companies or either of them in any other act or thing herein required to be kept, done or performed by them or either of them, then and in every such case the Trustee may, and, upon the request in writing of the holders of a majority in amount of the bonds hereby secured at the time outstanding, and upon being indemnified to its satisfaction against all costs and expenses to be incurred by it in complying with such request, the Trustee shall, with or without entry as aforesaid, proceed to sell and shall sell to the highest bidder therefor at public auction in the City of New York, the right, title, interest and estate of the Manhattan Company of, in and to the mortgaged premises, * * *.

"Fourth.—That, in lieu of the proceedings hereinabove described, upon any and every such default in the payment of any interest of the bonds hereby secured or of any of them, and its continuance as aforesaid, or upon any and every such default in the payment of the principal of any of the bonds hereby secured as herein provided, or upon any and every such default by the Railway Companies or either of them, in any other act or thing herein required to be done, kept or performed, by them or either of them, the Trustee may, in its discretion, and, if so directed in writing by the holders of a majority in the amount of the bonds hereby secured at the time outstanding shall, proceed by action, suit or other proper legal proceeding to foreclose

this mortgage and seek the appointment of a Receiver or Receivers of the mortgaged premises and of the rents, issues and profits thereof, who may be nominated for that purpose by such holders of said bonds; and the several remedies in these presents specified are cumulative and not exclusive one of the other. * * * No holder or holders of a bond or bonds hereby secured or of any interest coupons thereof shall have the right to institute any suit, action or proceeding in equity or at law for the foreclosure of these presents or the execution of the trusts hereof or for the appointment of a receiver of the premises hereby mortgaged or any part thereof, without having first given notice in writing to the Trustee of the fact that the default has occurred and requested the Trustee to proceed with all lawful remedies, and afforded it a reasonable opportunity to proceed to exercise the powers granted to it by these presents and to institute such suit, action or proceeding in its own name as may in its judgment be adapted to that end, * * *."

20. Plaintiff is informed and believes and therefore alleges that subsequent to the execution and delivery of the aforesaid mortgage, Manhattan entered into a certain Lease dated January 1, 1903, with Interborough and by said Lease (which was recorded in the Register's office, County of New York, on April 1, 1903, in Liber 2 of Conveyances, pp. 35 *et seq.*) Manhattan did lease and demise to Interborough all its right, title and interest in and to the property described in said lease, including generally all the railroads owned or operated by the lessor and constructed or to be constructed or acquired under its charter or in its right during the continuance of the lease, together with the emoluments, revenues, income, rents, issues and profits thereof, and all franchises and all cars, locomotives, engines, tools, implements, supplies, machinery, railroad equipments, power stations, electrical appliances and

equipments, and all privileges, easements, rights, fixtures, personalty and property, real, personal or mixed, of every nature or description, then owned or thereafter acquired, excepting generally such property as franchises necessary to preserve corporate existence. The said property was so leased for the term of 999 years from November 1, 1875, or so long as the lessee and its successors should continue to exist as a corporation and be capable of exercising all the functions therein stipulated on its behalf.

21. Plaintiff is informed and believes and therefore alleges that in May, 1932, there were lawfully laid, charged and imposed upon the mortgaged premises, or parts thereof, certain special franchise taxes and real estate taxes in amounts aggregating upwards of $780,000. Under the aforesaid Lease Interborough agreed to pay any and all taxes which during the terms of the Lease should be levied upon the leased property. In the bill of complaint in the above mentioned cause brought by the American Brake Shoe and Foundry Company, it is alleged, and by the answer of Interborough therein it is admitted, that certain taxes amounting with interest to over $860,000 have been duly assessed by the City of New York against special franchises and real estate belonging to Manhattan, and have not been paid; and Manhattan has heretofore notified Interborough that said special franchise taxes and real estate taxes amounting to upwards of $780,000 were due and payable on May 31, 1932, and has demanded that they be paid.

22. No part of the aforesaid taxes has been paid by Manhattan or by anyone else and such non-payment constitutes a default under the Consolidated Mortgage and such default still wholly continues.

23. By reason of the matters hereinbefore set forth, plaintiff is now entitled forthwith to proceed to protect and enforce its rights and the rights of the holders of the bonds and coupons secured by said Consolidated Mort-

gage, including the right to proceed by this bill of complaint or to take any other appropriate remedies, and including the right, if the mortgaged premises were not in the possession of this Court, to enter upon and take possession of the mortgaged premises and receive the rents, issues and profits thereof or by a receiver to take possession of the mortgaged property and of the tolls, income, rents, issues and profits thereof.

24. Under the aforesaid Lease Interborough took possession of substantially all of the property of Manhattan, all of which property so taken by Interborough is subject to the lien of the Consolidated Mortgage. This Court by its aforesaid order dated September 6, 1932, appointing the Manhattan Receiver provided (in addition to the provisions for reservation of the *status quo ante*) that the rights, powers and duties of the Manhattan Receiver should be "subject to all the rights of the defendant Interborough Rapid Transit Company and its Receivers under all leases and agreements between Interborough Rapid Transit Company and Manhattan Railway Company" and that nothing contained in said order should be deemed "to put the said Receiver of Manhattan Railway Company into physical possession of any properties now properly in the possession of the said Receivers of Interborough Rapid Transit Company under the order appointing them." Said mortgaged property is now in the possession of this Court as aforesaid and this Court has rendered the plaintiff unable to take possession thereof, or of the tolls, income, rents, issues and profits thereof; but plaintiff is now entitled, as of the date of the filing of this bill of complaint, and plaintiff hereby asserts its right as of said date, to have impounded during the continuance of default, for the benefit of this Trustee and the holders of the bonds and coupons secured by said Consolidated Mortgage, all said tolls, income, rents, issues and profits which on and after said date shall come into possession of the Interborough Receivers and/or any other person who shall be appointed

by this Court as receiver of the property of Interborough (including property leased to it by Manhattan) and/or Interborough and/or the Manhattan Receiver and/or any other person who shall be appointed by this Court as receiver of the property of Manhattan and/or Manhattan (without waiver of any claim of plaintiff to tolls, income, rents, issues and profits accruing prior to filing of this bill of complaint); and plaintiff is now entitled to the appointment of a receiver as hereinafter prayed for.

This Court has not as yet determined whether the receivers of the property of Interborough shall adopt the said Lease or shall reject it; in fact, it has not as yet been determined whether under the circumstances this Court has the power or authority to order the rejection of the Lease by the receivers. If the Lease shall be adopted the full stipulated rental will be payable by Interborough or the receivers of its property. If the leased property shall be returned to Manhattan or the receiver of its property, there will be payable by the Interborough or its receivers, at the minimum, the entire net earnings, properly to be computed, of the Manhattan property while held by Interborough receivers; or, as plaintiff is informed and believes and therefore alleges, there may be payable in such event by Interborough or its receivers an amount equal to the full rental stipulated in said Lease, or some other amount which should largely exceed the amount of said net earnings, in view of the fact that the operation of the property of Manhattan is very beneficial to Interborough and to the property owned by it and held by the Interborough receivers and in view of the further fact that the Manhattan property has a far greater value to the Interborough property while in the possession of Interborough or Interborough receivers than the amount of the net earnings of the property of Manhattan. If the full rental under said Lease shall be paid and all defaults under the Consolidated Mortgage shall be duly cured the lien hereby perfected upon the tolls, income, rents, issues and profits may be released, but whether in the future Interborough receivers shall

adopt or shall reject said Lease, and whether or not possession of the Manhattan property shall for any reason be returned to the Manhattan or its receiver, the plaintiff during the continuance of default under the aforesaid Consolidated Mortgage is entitled to the present impounding of the tolls, income, rents, issues and profits of the mortgaged property of Manhattan while in the possession of Interborough receivers and/or Interborough and/or a Manhattan receiver and/or Manhattan. Neither the relief effected nor the relief sought by the filing of this bill of complaint is intended in any way to affect or abrogate said Lease. However, the plaintiff does not waive, by any-
415 thing in this bill of complaint contained or otherwise, any right at any time hereafter to apply to this Court for directions to Interborough receivers and/or Manhattan receivers in respect of said Lease and/or the leased property or any part thereof, or to take any other action in respect thereto or for the enforcement of its rights and the rights of the holders of the bonds and coupons secured by said Consolidated Mortgage.

25. Substantially the only source of income to Manhattan during the continuance of the aforesaid Lease consists of payments provided to be made by Interborough thereunder. Interborough has already defaulted in the payment of a large amount of taxes payable as rental
416 thereunder. No intention has been indicated that Interborough or Interborough receivers will cure the existing default in respect of the non-payment of said taxes, or will continue to make the payments provided for in said Lease, or are about to return the leased premises. In the bill of complaint in the aforesaid cause brought by The American Brake Shoe and Foundry Company, it is alleged, and by the answer of Interborough therein it is admitted, that the Interborough has obligations presently due or about to become due in the amount of many millions of dollars, including floating indebtedness to the amount of over $2,500,000, which floating indebtedness is overdue, and that the defendant is unable even to pay said floating

indebtedness without consideration of the many millions of dollars of other indebtedness now due or about to become due, including rental payments under the aforesaid Lease in large amount due on October 1, 1932.

Manhattan has no funds with which to pay the aforesaid defaulted taxes, or any substantial part thereof. Furthermore, on October 1, 1932, there will be due and payable upon the bonds secured by the Consolidated Mortgage a semi-annual installment of interest at the rate of 4% per annum. Manhattan has outstanding not only the aforesaid bonds secured by the Consolidated Mortgage but also, as plaintiff is informed and believes and therefore alleges, 14
approximately $4,523,000 in principal amount of Second Mortgage Bonds secured by a certain Second Mortgage dated June 1, 1913, under which the defendant, The Chase National Bank of the City of New York, is Trustee. Under said Consolidated Mortgage and under said Second Mortgage, the failure to pay the aforesaid taxes due in May, 1932, constitutes a default, in consequence of which the principal of all the bonds outstanding under said mortgages may be declared to be due and payable as in said mortgages provided. Manhattan is unable to pay its debts and obligations as the same mature; and, by reason of the matters hereinbefore set forth, the security for the aforesaid Consolidated Mortgage is being wasted, impaired and endangered to the irreparable injury of plaintiff and of the holders of the bonds and coupons secured by said Consoli- 141
dated Mortgage, and there is grave danger that a large part of the security for the Consolidated Mortgage will be lost. By reason of the matters hereinbefore set forth, including particularly the accrual of taxes in large amounts which are not being paid, the sufficiency of the mortgaged property to secure the payment of the debt secured by the Consolidated Mortgage has become substantially doubtful and inadequate.

26. No proceedings have been had at law or in equity for the collection of said mortgage debt or any part thereof, or for the protection and enforcement of any of the rights

of the Trustee under said Consolidated Mortgage or of the holders of the bonds or coupons secured thereby, except this bill of complaint. Upon application of this plaintiff leave has been granted to it to include as defendants herein the Interborough Receivers and the Manhattan Receiver.

27. In consequence of the embarrassed condition of the financial affairs of Manhattan and of Interborough, and on account of the many difficulties and complications which are manifest upon and from the facts hereinbefore set forth, it is impossible for the plaintiff as Trustee under said Consolidated Mortgage adequately to execute its said
1421 trust and to protect the rights of the holders of said bonds and coupons without the interposition of this Honorable Court in equity sitting.

WHEREFORE, and inasmuch as this plaintiff can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, this plaintiff prays:

(1) that the said defendants be required to make answer respectively unto all and singular the matters hereinbefore stated and charged, but not under oath, answer under oath being hereby expressly waived;

(2) that an account be taken of all property sub-
1422 ject to the lien of said Consolidated Mortgage, and that said Consolidated Mortgage be decreed to be a valid lien upon all and singular the elevated lines, elevated routes, estates, leaseholds, properties, premises, rights, privileges and franchises and generally all property of every kind therein described and thereby intended to be mortgaged (save and except such property as may have been duly released from the lien thereof), that an account be had of all improvements, additions and extensions made since the execution of said Consolidated Mortgage upon any of said elevated lines or routes or property, real or

personal, and of any and all cars, carriages, tools, chattels, machinery, motors, engines and equipment of every description used or employed upon said elevated lines or routes or other mortgaged property or acquired for use upon or in connection with the same or any part thereof and generally of all property of every kind which has become a part of the security for said Consolidated Mortgage since the execution thereof, and that said Consolidated Mortgage may be declared to be a valid lien upon all such property, with the tolls, income, rents, issues and profits thereof;

(3) that a receiver be appointed, with the usual powers of receivers in like cases, of the property of every kind which is subject to the lien of said Consolidated Mortgage, and of the tolls, income, rents, issues and profits thereof, including the right, title and interest of Manhattan Railway Company as lessor under the Lease dated January 1, 1903, between Manhattan Railway Company and Interborough Rapid Transit Company, and that such directions may be made with respect to such receivership as may be equitable and proper; provided, however, that the order entered in respect of this complaint shall not affect or abrogate said Lease dated January 1, 1903, and provided, further, that nothing contained in any such order shall affect or prejudice the right of plaintiff at any time to apply to this Court for directions to any receiver of the property of Interborough Rapid Transit Company and/or any receiver of the property of Manhattan Railway Company in respect of said Lease and/or leased property or any part thereof, or to take any other action in respect thereto or for the enforcement of its rights and the rights of the holders of the bonds and coupons secured by said Consolidated Mortgage;

1426

(4) that all tolls, income, rents, issues and profits of the mortgaged property (constituting, until otherwise determined, all property of Manhattan Railway Company) which tolls, income, rents, issues and profits shall hereafter come into the possession of the Interborough Receivers and/or any other receiver of the property of Interborough and/or Interborough and/or the Manhattan Receiver and/or any other receiver of the property of Manhattan and/or said Manhattan be impounded as of the date of the filing of this bill of complaint (without waiver of any claim of plaintiff to tolls, income, rents, issues and profits, accruing prior to the filing of this bill of complaint) for the benefit of this plaintiff, as Trustee as aforesaid, and of the holders of bonds and coupons secured by the aforesaid Consolidated Mortgage, and be applied to and for such benefit, subject only to such expenses as may lawfully and properly be incurred in the operation and preservation of said property, having due regard for the rights of said Trustee and of the holders of said bonds and coupons and for the protection of the security of said mortgage lien;

1427

(5) that the Interborough Receivers and any other receiver of the property of Interborough and the Manhattan Receiver and any other receiver of the property of Manhattan be directed to account for and from time to time pay over to the receiver to be appointed in this cause, the entire net earnings of the property, in the possession of them or any of them, which is subject to the lien of the aforesaid Consolidated Mortgage, provided, however, that any receiver of the property of Interborough shall not be required to pay over to the receiver to be appointed in this cause an amount exceeding the rental payable under said Lease dated January 1, 1903, for so long a time as said Lease may continue in force;

1428

(6) that plaintiff may have such other and further relief in the premises as the nature of the case may require and as may be in accordance with equity.

May it please your Honors to grant to plaintiff a writ or writs of subpoena to be directed to the said defendants Manhattan Railway Company, Interborough Rapid Transit Company, Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of the property of Interborough Rapid Transit Company, William Roberts, as Receiver of the property of Manhattan Railway Company, The Chase National Bank of the City of New York, as Trustee under Second Mortgage of Manhattan Railway Company, and The American Brake Shoe and Foundry Company, commanding them and each of them at a certain time and under a certain penalty therein to be named, to be and appear before your Honors in this Honorable Court, then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to abide by and perform such other and further orders or decrees as to your Honors shall seem meet.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee,
By F. WOLFE,
Asst. Vice-President.

(Seal)

Attest:

J. T. HARRIGAN,
Assistant Secretary.

DAVIES, AUERBACH & CORNELL,
Solicitors for Plaintiff.

EDWARD CORNELL,
H. C. MCCOLLOM,
Of Counsel.

Doc. 54

Bond of William Roberts, Receiver of Manhattan Railway Company.

AMERICAN SURETY COMPANY OF NEW YORK
Organized 1884

IN THE

DISTRICT COURT OF THE UNITED STATES

1433

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364
IN THE MATTER OF 1434 The Petition of MANHATTAN RAILWAY COMPANY.	

KNOW ALL MEN BY THESE PRESENTS, that WILLIAM ROBERTS, of 233 Broadway, New York City, as Principal and the American Surety Company of New York, having an office and principal place of business at No. 100 Broadway, Borough of Manhattan, in the City of New York, State of New York, as Surety, are held and firmly bound

unto the United States of America in the sum of one hundred thousand ($100,000.00) Dollars, lawful money of the United States, to be paid to the said United States of America, for which payment well and truly to be made, the said WILLIAM ROBERTS binds himself, his heirs, executors and administrators and said surety company binds itself, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 6th day of September, 1932.

WHEREAS by an order made by Hon. Martin T. Manton, United States District Judge, dated the 6th day of September, 1932, the said William Roberts was appointed, with the usual powers, Receiver of the property of Manhattan Railway Company and was authorized to enter upon the discharge of his duties as such Receiver upon giving the bond by said order required.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, if the said William Roberts shall in all events well and truly perform the duties of their office and duly account for all moneys or property which shall come into their hands as such Receivers, then this Obligation to be void; otherwise it shall remain in full force and effect.

WILLIAM ROBERTS (L. S.)

AMERICAN SURETY COMPANY OF NEW YORK,
By W. SCOTT REIG, (L. S.)
Attorney-in-Fact.

(L. S.)

Witness:
DUANE R. DIEN

1438 *American Brake Shoe Record.*
Bond of William Roberts—Manhattan Receiver.

COUNTY OF NEW YORK, }
STATE OF NEW YORK, } ss.:

On this 6th day of September, 1932, before me personally appeared W. Scott Reig, who, being by me duly sworn did depose and say that he resides in New York City, that he is the Attorney-in-Fact of the AMERICAN SURETY COMPANY OF NEW YORK, the corporation described in and which executed the above instrument, that he knows the corporate seal of said corporation, that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Trustees of the said corpo-
1439 ration, and that he signed his name to the said instrument by like order, that the said Corporation is organized, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has complied with all the requirements of said laws applicable to surety companies, and is duly qualified to act as surety under the laws of said State, and is worth more than Six Million Dollars ($6,000,000) exclusive of property exempt from execution, and above and over the amount of all its debts and liabilities or other encumbrances, and that said property consists of cash, real estate, municipal and railroad bonds and stocks, which are lawful investments for said corporation.

W. SCOTT REIG.

1440 Sworn to before me this
6th day of September, 1932.

DOROTHY E. MEINTZER,
Notary Public, New York County.
New York County Clerk's No. 462.
Term expires March 30th, 1934.

The within bond is hereby approved.

MANTON,
U. S. Circuit Judge, sitting by assignment in the District Court for the Southern District of New York.

Doc. 55

Bond of Thomas E. Murray, Jr., Receiver of Interborough Rapid Transit Company.

AMERICAN SURETY COMPANY OF NEW YORK

Capital $5,000,000

LIMITED POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:

That the AMERICAN SURETY COMPANY OF NEW YORK, a corporation of the State of New York, of No. 100 Broadway, in the City of New York, in said State, has made, constituted and appointed, and by these presents does hereby make, constitute and appoint LEON SEKESON its true, sufficient and lawful attorney, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, a bond or undertaking, as follows: in behalf of any Receiver or Receivers appointed for Interborough Rapid Transit Company in any action or proceeding in the United States District Court for the Southern District of New York, not exceeding the sum of Five Hundred Thousand Dollars ($500,000.00)—hereby giving its said attorney full power and authority to do everything whatsoever requisite and necessary to be done for the purpose of making, executing and delivering such obligations as fully as the officers of said American Surety Company of New York could do if personally present, and hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue hereof, but reserving to itself full power of substitution and revocation.

The authority contained herein is void if not availed of within thirty days from the date of this instrument.

1444 *American Brake Shoe Record.*
Bond of T. E. Murray, Jr., I. R. T. Receiver.

IN WITNESS WHEREOF, the said American Surety Company of New York has caused its corporate seal to be hereunto affixed and these presents to be duly executed by its proper officers at the City of New York, State of New York, on this 25th day of August, 1932.

AMERICAN SURETY COMPANY OF NEW YORK,
By MARSHALL L. BROWER,
(L. S.) Resident Vice-President.

Attest:

1445 WILLIAM WISHART, JR.,
Resident Assistant Secretary.

At a regular meeting of the Executive Committee of the Board of Trustees of the American Surety Company of New York, held at the office of the Company at No. 100 Broadway, in the City of New York, on the twelfth day of April, 1927, the following resolution was adopted:

"*Resolved,* That one of the Resident Vice-Presidents and one of the Resident Assistant Secretaries of this Company at New York, in the State of New York, be and they hereby are authorized and empowered to make, execute and deliver, in behalf of
1446 the Company, unto such person or persons in the State of New York, as they may select, its power of attorney constituting and appointing each such person its Attorney in Fact, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, any particular bond or undertaking that may be required in the said State of New York, the nature of such bond or undertaking to be in each instance specified in such power of attorney."

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

I, I. C. CLARK, Assistant Secretary of the American Surety Company of New York, hereby certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company at the City of New York, this 25th day of October, 1928.

I. C. CLARK,
Assistant Secretary.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this day personally appeared before me, a Notary Public, in and for the County aforesaid, MARSHALL L. BROWER and WILLIAM WISHART, JR., who, being duly sworn by me, did depose and say that they are respectively a Resident Vice-President and a Resident Assistant Secretary, at the City of New York, of the American Surety Company of New York; and they, as such Resident Vice-President and Resident Assistant Secretary, respectively, did thereupon acknowledge and deliver the foregoing instrument of writing as and for the act and deed of the American Surety Company of New York.

Witness my hand and seal, this 25th day of August, 1932.

DOROTHY E. MEINTZER,
Notary Public, New York County.
New York County Clerk's No. 462.
(L. S.) Term expires March 30th, 1934.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

C. H. HALL, being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the resources and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $7,500,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

C. H. HALL (L. S.)

Subscribed and sworn before me
this 25th day of August, 1932.

B. L. REHBERGER,
Notary Public, Kings County.
Certificate filed in all Counties.
(L. S.) Kings Co. Clerk's No. 510, Reg. No. 3137.
Bronx Co. Clerk's No. 21, Reg. No. 76-R-33.
New York Co. Clerk's No. 329, Reg. No. 3-R-223.
My Commission expires March 30, 1933.

(Financial Statement as of December 31, 1931, hereto attached.)

American Brake Shoe Record. 14
Bond of T. E. Murray, Jr., I. R. T. Receiver.

AMERICAN SURETY COMPANY OF NEW YORK
Organized 1884

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

against 145

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

KNOW ALL MEN BY THESE PRESENTS, that THOMAS E. MURRAY, JR., of the City of New York, as Principal, and the AMERICAN SURETY COMPANY OF NEW YORK, having an office and principal place of business at No. 100 Broadway, Borough of Manhattan, in the City of New York, State of New York, as Surety, are held and firmly bound unto the United States of America in the sum of One Hundred Thousand ($100,000) Dollars, lawful money of the United States, to be paid to the said United States of America, for which payment well and truly to be made, 1455
the said Thomas E. Murray, Jr., binds himself, his heirs, executors and administrators, and said surety company binds itself, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 26th day of August, 1932.

WHEREAS, by an order made by Hon. Martin T. Manton, United States Circuit Judge, dated the 26th day of August, 1932, the said Thomas E. Murray, Jr., was appointed,

with the usual powers, Equity Receiver of the property of Interborough Rapid Transit Company, jointly with Hon. Victor J. Dowling, and was authorized to enter upon the discharge of his duties as such Equity Receiver upon giving the bond by said order required.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Thomas E. Murray, Jr., shall in all events well and truly perform the duties of his office and duly account for all moneys or property which shall come into his hands as such Receiver, then this obligation to be void; otherwise it shall remain in full force and effect.

THOMAS E. MURRAY, JR. (L. S.)

AMERICAN SURETY COMPANY OF NEW YORK,
By LEON SEKESON, (L. S.)
(L. S.) Attorney-in-Fact.

COUNTY OF NEW YORK, } SS.:
STATE OF NEW YORK, }

On this 26th day of August, 1932, before me personally appeared LEON SEKETON, who, being by me duly sworn, did depose and say that he resides in New York City, that he is the Attorney-in-Fact of the American Surety Company of New York, the corporation described in and which executed the above instrument, that he knows the corporate seal of said corporation, that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Trustees of the said corporation, and that he signed his name to the said instrument by like order, that the said corporation is organized, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has complied with all the requirements of said laws applicable to surety companies, and is duly qualified to act as surety under the laws of said State, and is worth more than Six

Million Dollars ($6,000,000), exclusive of property exempt from execution, and above and over the amount of all its debts and liabilities or other encumbrances, and that said property consists of cash, real estate, municipal and railroad bonds and stocks, which are lawful investments for said corporation.

LEON SEKESON.

Sworn to before me this
26th day of August, 1932.

DOROTHY E. MEINTZER,
Notary Public, New York County.
New York County Clerk's No. 462.
(L. S.) Term expires March 30, 1934.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

On this 26th day of August, 1932, before me personally appeared the within named THOMAS E. MURRAY, JR., to me known, and known to me to be the individual described in and who executed the within bond, and he duly acknowledged to me that he executed the same.

ARTHUR G. PEACOCK,
Notary Public, Queens County.
Certificate filed in New York County, No. 300.

The within Bond is hereby approved.

MARTIN T. MANTON,
U. S. Judge.

(Filed August 26, 1932.)

Doc. 56

Bond of Victor J. Dowling, Receiver, Interborough Rapid Transit Company.

AMERICA EMPLOYERS' INSURANCE COMPANY
of Boston, Mass.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, vs. INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	Receiver in Equity #70-364

The undersigned, VICTOR J. DOWLING, of 25 Broadway, New York, N. Y., as principal, and the AMERICAN EMPLOYERS' INSURANCE COMPANY, a Massachusetts corporation, organized and existing under the Laws of the Commonwealth of Massachusetts, and authorized to do business in the State of New York, having an office at 81 John Street, New York, N. Y., as surety, are jointly and severally held and firmly bound unto the UNITED STATES OF AMERICA in the penal sum of One Hundred Thousand and 00/100 ($100,000.00) Dollars, lawful money of the United States of America, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors and assigns, jointly and severally, firmly by these presents.

SIGNED and SEALED this 29th day of August, 1932.

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH, that whereas the above named Victor J. Dowling and Thomas E. Murray were on the 26th day of August, 1932, by decree of the said District Court of the United States, appointed Receivers in the above entitled case of all and singular the property, assets and credits of INTERBOROUGH RAPID TRANSIT COMPANY, defendant.

NOW, THEREFORE, if the said Victor J. Dowling shall in all events well and truly perform the duties of his office and truly account for all moneys or property which shall come into his hands as such Receiver, then this obligation to be void, otherwise it shall remain in full force and effect.

VICTOR J. DOWLING.
AMERICAN EMPLOYERS' INSURANCE COMPANY,
By A. I. MICHELSEN,
Attorney-in-fact.

(Corporate Seal)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On the 8th day of August, 1932, before me personally appeared VICTOR J. DOWLING, to me known and known to me to be the person described in and who executed the foregoing instrument, and he thereupon acknowledged to me that he executed the same.

M. S. LICHENSTADTER,
Notary Public, New York County.
Certificates filed in Counties of
New York Co. Clerk's No. 148, Reg. No. 4 L 353.
Kings Co. Clerk's No. 160, Reg. No. 4258.
Bronx Co. Clerk's No. 31, Reg. No. 124 L 34.
Queens Co. Clerk's No. 622, Reg. No. 2884.
Commission expires March 30, 1934.

American Brake Shoe Record.
Bond of V. J. Dowling, I. R. T. Receiver.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 29th day of August, 1932, before me personally appeared A. I. MICHELSEN, Attorney-in-fact of the AMERICAN EMPLOYERS' INSURANCE COMPANY, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of Kings; that he is an Attorney-in-fact of the American Employer's Insurance Company, the Corporation described in and which executed the within instrument; that he knows the corporate seal of said Corporation; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Corporation, and that he signed said instrument as an Attorney-in-fact of said Corporation by like authority, and that the Superintendent of Insurance of the State of New York has, pursuant to Chapter 33 of the Laws of the State of New York for the year 1909 constituting Chapter 28 of the Consolidated Laws of the State of New York known as the Insurance Law, as amended by Chapter 182 of the Laws of the State of New York for the year 1913, issued to the American Employers' Insurance Company his certificate that said Corporation is qualified to become and be accepted as surety or guarantor on all bonds, undertakings, recognizances, guaranties and other obligations required or permitted by law, and that such certificate has not been revoked.

E. R. PRESCOTT,
Notary Public, New York County.
N. Y. Co. Clks. No. 311, Reg. No. 3 P 432.
Kings Co. Clks. No. 82, Reg. No. 3281.
Bronx Co. Clks. No. 47, Reg. No. 132 P 33.
Queens Co. Clks. No. 1283, Reg. No. 9006.
(Seal) Commission expires March 30, 1933.

COPIES OF RESOLUTIONS.

At a meeting of the Board of Directors of the American Employers' Insurance Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts duly called and held on the 29th day of May, 1923, a quorum being present, the following resolutions were adopted:

"That the President, or, in his absence, any Vice-President, may from time to time appoint Attorneys-in-fact to represent and act for and on behalf of the corporation as respects its surety and fidelity business, and that the President, or in his absence, any Vice-President may at any time remove any such Attorney-in-fact and revoke all power and authority given to any such Attorney-in-fact."

"That all bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof shall be signed by the President, a Vice-President or an Attorney-in-fact and shall have the seal of the company affixed thereto, duly attested by the Secretary, an Assistant Secretary or an Attorney-in-fact."

"That Attorneys-in-fact may be given full power and authority to execute for and in the name of and on behalf of the corporation any and all bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the corporation as if signed by the President and sealed and attested by the Secretary, and, further, Attorneys-in-fact are hereby authorized to verify any affidavits required to be attached to bonds, recognizances, contracts of indemnity and all other writings obligatory in the nature thereof, and are, also, authorized and empowered to certify to a copy of any of the by-laws

of the corporation, as well as any resolution of the Directors having to do with the execution of bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof, or with regard to the powers of any of the officers of the corporation or of Attorneys-in-fact."

I, A. I. MICHELSEN, Attorney-in-fact of the AMERICAN EMPLOYERS' INSURANCE COMPANY, do hereby certify that the foregoing are true copies of resolutions of the Board of Directors of the American Employers' Insurance Company relating to the execution of bonds, undertakings, recognizances, contracts of indemnity and all other writings obligatory in the nature thereof, and all of the said resolutions, and that said resolutions are still in force.

Given under my hand and the seal of the Corporation, in the County of New York, State of New York, this 29th day of August, 1932.

A. I. MICHELSEN,
Attorney-in-fact.

(Seal)

AMERICAN EMPLOYERS' INSURANCE COMPANY
OF BOSTON, MASS.

EDWARD C. STONE, President
Financial Statement, December 31, 1931,
as Filed with Massachusetts Insurance Department

ASSETS

Bonds and Stocks valued on basis approved by the National Convention of Insurance Commissioners	$5,720,729.00
Cash on Hand and in Banks	217,032.89
Premiums in Course of Collection, not over Three Months Due	825,027.63
Due from Reinsurance Companies	25,891.02
Equity in The Workmen's Compensation Reinsurance Bureau Fund	39,075.85
Interest Due and Accrued	51,955.85
	$6,879,712.24

LIABILITIES

Reserve for Losses	$2,567,954.00
Reserve for Unearned Premiums	1,989,060.47
Reserve for Commissions	179,422.16
Reserve for Expenses and Taxes Due and Accrued	160,000.00
The Workmen's Compensation Reinsurance Bureau Loss Reserve	10,704.54
Contingent Reserve	300,000.00
Capital Paid Up	1,000,000.00
Surplus over all Liabilities	672,571.07
	$6,879,712.24

1480 *American Brake Shoe Record.*
Bond of V. J. Dowling, I. R. T. Receiver.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

A. I. MICHELSEN, being duly sworn, says that he is Attorney-in-fact of the American Employers' Insurance Company, and that to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company, as of December 31, 1931.

A. I. MICHELSEN,
(Seal) Attorney-in-fact.

1481 In witness whereof I have hereunto set my hand and affixed my official seal this 29th day of August, 1932.

E. R. PRESCOTT,
Notary Public, New York County.
N. Y. Co. Clks. No. 311, Reg. No. 3 P 432.
Kings Co. Clks. No. 82, Reg. No. 3281.
Bronx Co. Clks. No. 47, Reg. No. 132 P 33.
Queens Co. Clks. No. 1283, Reg. No. 9006.
(Seal) Commission expires March 30, 1933.

KNOW ALL MEN BY THESE PRESENTS, that the AMERICAN EMPLOYERS' INSURANCE COMPANY, a corporation duly
1482 organized and existing under the laws of the Commonwealth of Massachusetts, and having its principal office in the City of Boston, Mass., hath made, constituted and appointed, and does by these presents make and constitute and appoint A. I. MICHELSEN of New York and State of New York its true and lawful Attorney-in-fact, with full power and authority hereby conferred in its name, place and stead, to sign, execute and acknowledge for and on its behalf as surety any and all bonds or undertakings required in the State of New York in amounts not exceeding

One hundred thousand dollars ($100,000.) and to bind the American Employers' Insurance Company thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the Company, and duly attested by its Secretary, hereby ratifying and confirming all the acts of said Attorney-in-fact pursuant to the power herein given. This Power of Attorney is made and executed pursuant to and by authority of the following resolutions adopted by the Board of Directors of the American Employers' Insurance Company at a meeting duly called and held on the Twenty-ninth day of May, 1923.

"That the President, or, in his absence, any Vice-President, may from time to time appoint Attorneys-in-fact to represent and act for and on behalf of the corporation as respects its surety and fidelity business, and that the President, or, in his absence, any Vice-President may at any time remove any such Attorney-in-fact and revoke all power and authority given to any such Attorney-in-fact.

That all bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof shall be signed by the President, a Vice-President, or an Attorney-in-fact and shall have the seal of the company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or an Attorney-in-fact.

That Attorneys-in-fact may be given full power and authority to execute for and in the name and on behalf of the corporation any and all bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the corporation as if signed by the President and sealed and attested by the Secretary, and, further, Attorneys-in-fact are hereby authorized to verify any affidavit required

to be attached to bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof, and are, also, authorized and empowered to certify to a copy of any of the by-laws of the corporation, as well as any resolutions of the Directors having to do with the execution of bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof, or with regard to the powers of any of the officers of the corporation or of Attorneys-in-fact."

IN WITNESS WHEREOF, the American Employers' Insurance Company has caused these presents to be signed by its Vice-President and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 18th day of August, A. D. 1930.

AMERICAN EMPLOYERS' INSURANCE COMPANY,
(Signed) By A. B. POOR,
(Seal) Vice-President.

Attest:

(Signed) ROGER G. WHEAR,
Assistant Secretary.

American Brake Shoe Record.
Bond of V. J. Dowling, I. R. T. Receiver.

COMMONWEALTH OF MASSACHUSETTS, }
COUNTY OF SUFFOLK, } ss.:

On this 18th day of August, A. D. 1930, before me personally came A. B. POOR, to me known, who, being by me duly sworn, did depose and say that he resides in the Town of Winthrop, Mass.; that he is the Vice-President of the American Employers' Insurance Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name hereto by like order.

(Signed) JAMES E. KEARY,
Notary Public.

COMMONWEALTH OF MASSACHUSETTS, }
COUNTY OF SUFFOLK, } ss.:

I, MARC HUBBERT, Assistant Secretary of the American Employers' Insurance Company, do hereby certify that the above and foregoing is a true and correct copy of an instrument executed by said American Employers' Insurance Company which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Corporation, at the City of Boston, this 29th day of August, 1932.

(Seal)

MARC HUBBERT,
Assistant Secretary.

Affidavit of Victor J. Dowling.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

1493 v.

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

VICTOR J. DOWLING, being duly sworn, says:

Prior to my appointment as a temporary Receiver of the Interborough Rapid Transit Company in the above-entitled cause, pursuant to order of Hon. Martin T. Man-
1494 ton, entered August 26, 1932, I had severed my association with the law firm of Chadbourne, Stanchfield & Levy and had no further connection therewith.

Since the date of the severance of my association I have not rendered any services for said firm nor had any relations therewith; and I have no claim to or interest in said firm, actual or contingent, present or prospective, all claims respecting services rendered prior to my severance having heretofore been completely settled.

American Brake Shoe Record.
Affidavit of Victor J. Dowling.

I was a director in the Equitable Life Assurance Society. When I ascertained upon my return to this country that it was interested in the securities of the Manhattan Elevated Railway Company, I at once resigned my directorship therein.

VICTOR J. DOWLING.

Subscribed and sworn to before me
this 23rd day of September, 1932.

JOHN R. HALPIN,
Notary Public,
Kings County.
Clerk's No. 707, Reg. No. 3420.
N. Y. Co. Clks. No. 1251, Reg. No. 3H804.
Commission expires March 30, 1933.

(Seal)

Doc. 58

Affidavit of Publication of Notice to Creditors of Manhattan Railway Company.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:
BOROUGH OF MANHATTAN,

THOMAS J. NESTOR, being duly sworn, says that he is the Principal Clerk of the Publisher of the "New York Evening Post," a daily newspaper printed and published in the City and County of New York, Borough of Manhattan; that the advertisement hereto annexed has been regularly published in the said "New York Evening Post" on the 13th day of September, 1932.

THOMAS J. NESTOR.

Sworn to before me this
14th day of September, 1932.

GEORGE TOBIN,
Notary Public,
Kings County.
Co. Clerk's No. 72, Reg. No. 4073.
Certificate filed in N. Y. County.
Co. Clk's No. 140, Reg. No. 4T88.
Commission expires March 30, 1934.

(Notarial Seal)

American Brake Shoe Record.
Affidavit of Publication of Notice to Creditors.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

IN THE MATTER
OF
The Petition of MANHATTAN RAILWAY COMPANY.

In Equity
E 70 364

To the Creditors of Manhattan Railway Company:

PLEASE TAKE NOTICE that a hearing will be held on September 22, 1932, at room 439, in the Old Post Office Building, Borough of Manhattan, City of New York, at 10.30 o'clock in the forenoon, why the receivership of Manhattan Railway Company should not be continued during the pendency of the above-entitled suit, and that upon the hearing of said order to show cause any creditor of Manhattan Railway Company or other party in interest may be heard.

Dated, New York, September 13, 1932.

WILLIAM ROBERTS,
Receiver of Manhattan Railway Company.

HUGHES, SCHURMAN & DWIGHT,
Solicitors for the Receiver of Manhattan
Railway Company.

Doc. 59

Notice of Motion by Protective Committee for 7% Stock of Manhattan Company in Re Receivers' Application No. 9.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,
against
1505 INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity
E 70-364

Sirs:

On you and each of you we hereby serve a copy of the motion and of the proposed order thereon filed by us on yesterday, September 26th, in behalf of Harold Palmer and others as the Protective Committee for the holders of Manhattan Railway Company Guaranteed Seven Per Cent. Stock at the hearing at which you were present before his Honor, The Honorable Martin T. Manton, Circuit Judge, in his Chambers, upon the Petition of the Temporary Receivers for Interborough Rapid Transit
1506 Company on their application number 9 relating to certain obligations of said Company maturing October 1, 1932, on which said motion and on other matters referred to in said application, the Court will hear the interested parties on October 3, 1932, at 3 P. M.

Dated, New York, N. Y., September 29, 1932.

Yours, etc.,

MARSHALL & WEHLE,
Solicitors for Intervenors,
Harold Palmer and others,
No. 50 Broadway,
New York, N. Y.

To:

MESSRS. CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., Temporary Receivers of Interborough Rapid Transit Company,
25 Broadway, New York, N. Y.

MESSRS. HUGHES, SCHURMAN & DWIGHT,
Solicitors for William Roberts, Temporary Receiver of Manhattan Railway Company,
100 Broadway, New York, N. Y.

Doc. 59a

Motion of Harold Palmer and Others as Protective Committee for Manhattan Railway Company Seven Per Cent. Guaranteed Stock Relating to Proposed Instructions to Receivers on Their Application No. 9.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

Come now Harold Palmer and others as the Protective Committee for holders of Manhattan Railway Company Seven Per Cent. Guaranteed Stock, intervenors herein by

1510 *American Brake Shoe Record.*
Notice of Motion by Palmer & Ors. Committee.

order of this Court dated September 28, 1932, and in the ex parte hearing on Receivers' Application No. 9, of which they have received informal notice, now move the Court for an order directing the Receivers of Interborough Rapid Transit Company on October 1st to pay out of funds on hand the aggregate sum of $76,142.50 to apply upon the guaranteed dividend rental of $1.75 per share upon the 43,510 outstanding shares of Manhattan Railway Company stock which did not participate in the readjustment plan of May 1, 1922, such payment to be made by them directly to such stockholders of Manhattan Railway Com-
1511 pany as furnished to the Receivers by said Company and to be wholly without prejudice as to the binding nature of the indenture of lease of January 1, 1903, between Manhattan Railway Company and Interborough Rapid Transit Company upon said Receivers, or as to such rights as they may have, if any, to disaffirm or reject such lease.

Dated, New York, N. Y., September 26, 1932.

MARSHALL & WEHLE,
Solicitors for Petitioners.

1512

Doc. 59b

Proposed Order as to 7% Stock of Manhattan Company, in Relation to Receivers' Application No. 9.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70 364

This cause coming on to be heard upon Application No. 9 of the Receivers of Interborough Rapid Transit Company and upon the motion of Harold Palmer and others as the Protective Committee for the Manhattan Railway Company "Seven Per Cent. Guaranteed Stock," being the stock of said Company which did not assent to the readjustment plan of May 1, 1922, and the Court being duly advised, it is

ORDERED that Victor J. Dowling and Thomas E. Murray, Jr., as Receivers for Interborough Rapid Transit Company, be and they are hereby directed on October 1, 1932, to pay out of funds on hand the aggregate sum of $76,142.50 to apply upon the guaranteed dividend rental of $1.75 per share upon the 43,510 outstanding shares of Manhattan Railway Company stock which did not par-

ticipate in the readjustment plan of May 1, 1922, such payment to be made by them directly to such stockholders of Manhatan Railway Company as furnished to the Receivers by said Company and to be wholly without prejudice as to the binding nature of the indenture of lease of January 1, 1903, between Manhattan Railway Company and Interborough Rapid Transit Company upon said Receivers, or as to such rights as they may have, if any, to disaffirm or reject such lease.

Justice of the United States District Court
for the Southern District of N. Y.

Doc. 60

Answer of Interborough Receivers to Petition of William Roberts, Receiver of Manhattan.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	IN EQUITY E 70-364

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers of Interborough Rapid Transit Company (hereinafter called "Interborough"), as and for their answer to the petition of William Roberts, Receiver of Manhattan Railway Company (hereinafter called "Manhattan"), state:

I. They are without knowledge as to each and every allegation set forth in paragraph IV of the petition, except they admit that the bill of complaint herein alleges "that the defendant has neglected and failed to pay certain taxes for 1932 duly assessed by the City of New York against the special franchises and real estate belonging to the Manhattan, the amount of such unpaid taxes now due thereon being in excess of $860,000," and that the answer of the defendant herein admits such allegation and that these Receivers have not paid said taxes.

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II. They allege that they are without knowledge as to each and every allegation set forth in paragraph VI of the petition, except they admit that the Interborough and the City of New York have made large investments by virtue of the contracts between the City of New York and the Interborough and certain Certificates duly granted by the City of New York acting by the Public Service Commission, and except they deny, upon information and belief, that the Manhattan has made any investments in the combined system of elevated and subway lines other than the properties covered by the lease by it to the Interborough.

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III. They allege that they are without knowledge as to each and every allegation set forth in paragraph VII of the petition, except they deny that they have all the moneys that have arisen from the operation of the Manhattan, and except they admit that the properties of the Manhattan which are subject to the lease described in the petition are in the possession of these Receivers.

IV. They deny each and every allegation set forth in paragraph VIII of the petition, except they allege that they are without knowledge as to the amount to which the Manhattan is justly and reasonably entitled as proper compensation for the use of its properties, and they admit

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that the Receivers have funds in excess of the amount of said taxes and bond interest, but they allege that they are without knowledge at this time, and cannot obtain such knowledge without the investigation hereinafter referred to, as to whether any of said funds should, or having due regard to the rights or priorities of other creditors, may be used for making payments of said taxes or bond interest.

V. They deny each and every allegation set forth in paragraph IX of the petition, except they admit that under Contract 3 the Interborough has for many years received,

and it is expected by the Accounting Department of the Receivers that there will continue to be received, a net profit amounting to not less than $3,170,000 per year over and above all expenses of operation, including interest and sinking fund charges on Interborough obligations issued for the construction or equipment of the subways, and further, that the gross operating revenue from the Manhattan Division is approximately equal to the operating expenses and taxes of such division, and except they allege that the income of these Receivers is derived principally from the operation of the subway division.

VI. They deny each and every allegation set forth in paragraph X of the petition, except they admit that the Interborough's income statement of the Manhattan Division operations for the twelve months ending June 30, 1932, shows a "net operating revenue" of $3,066,918.55 from the Manhattan Division as distinguished from the Manhattan mortgaged lines, before deducting taxes or current rent deductions, and they allege that after deducting taxes, which amounted to $1,931,736.31, and current deductions amounting to $2,364,970.92, for the twelve months ending June 30, 1932, the deficit in the operations of the Manhattan Division amounted to *$1,229,788.68* without deducting the interest and sinking fund requirements amounting to $3,205,310.35 for the year ending June 30, 1932, for the $31,132,537 of First Mortgage Five Per Cent. Bonds, $14,650,537 of Ten Year Seven Per Cent. Notes, and $1,877,552 of Ten Year Unsecured Six Per Cent. Notes, the proceeds of which were used to pay the costs of the additional tracks upon the Manhattan railroads, the cost of improving the power plant of the Manhattan, and the cost of the railroads constructed under the Interborough Certificate of March 19, 1913.

They admit that the sum of $3,066,918.80, together with the balance of income from the subway division, amounting to $3,586,640.97, exceeds $6,000,000, but they allege that

1528 sum was less, by $831,749.17, than the total cost of operations of the combined subway and elevated systems for the year 1932. Said last-mentioned figure does not take into consideration the so-called dividend rentals of 5% on the Manhattan modified guaranteed stock which is payable only if earned and which would amount to $2,782,450.

The net preferential for the year ending June 30, 1932, was	$ 3,178,100.00
This was used to pay interest and sinking fund on $47,660,626 of I. R. T. 5% bonds, 7% notes and 6% notes issued to pay the cost of third tracks, power plant improvements of Manhattan Division and the lines of the Interborough constructed pursuant to the Interborough Certificate because the elevated lines earned nothing to apply on this fixed charge	$ 3,205,310.35
Deficit after use of subway net preferential	*$ 27,210.35*
The elevated deficit was	*$ 1,229,788.68*
Applying all other available system income amounting to	398,039.51
Left a system deficit of	*$ 831,749.17*

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1530 VII. They allege they are without knowledge as to each and every allegation set forth in paragraph XI of the petition, except they allege that the Interborough has at the present time outstanding obligations in excess of $47,000,000 on account of third tracks and power plant improvements made upon the Manhattan mortgaged properties and upon the railroad lines of Interborough made pursuant to Interborough Certificate of 1913, and they deny, upon information and belief, that the investment by the Interborough in the third tracks and power plant im-

provements upon the Manhattan properties will be lost by the Interborough or its Receivers, and for the fiscal years ending June, 1929, and June, 1930, the Interborough paid in addition to the items set forth in said paragraph XV an additional amount as rental upon the Manhattan modified guaranteed stock, and they allege that only after an investigation in the manner hereinafter described in this answer can the value of the property owned by Manhattan or subject to the lien of its first mortgage be determined.

VIII. Answering paragraph XV of the petition, they allege that in addition to the rentals therein described the Interborough has paid the full 5% dividend rental upon the Manhattan modified guaranteed stock for the year ending June 30, 1928.

IX. They are without knowledge at this time as to each and every allegation set forth in paragraph XVI of the petition and cannot obtain said knowledge without an investigation for that purpose as hereinafter set forth.

X. They allege that at the present time they are without knowledge as to each and every allegation set forth in paragraph XVII of the petition, and cannot obtain that knowledge without an investigation for that purpose as hereinafter set forth.

FURTHER ANSWERING THE PETITION, THESE RESPONDENTS SHOW:

XI. On September 28, 1932, these Receivers duly petitioned this Court for an order:

> "that they may receive the instructions of the Court with respect to the payment of the amounts which have heretofore become due and payable and which will on October 1, 1932, and thereafter, become

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payable by way of rental under the lease from Manhattan; that in view of the interest of Guaranty Trust Company of New York, as Trustee under the First & Refunding Mortgage of Interborough, dated March 28, 1913, as above set forth, said Trustee be brought in as a party to this cause; that all the parties to this cause, including the intervenors and said Guaranty Trust Company of New York, as Trustee as aforesaid, be directed to answer the foregoing petition on such date as the Court may fix, and that the foregoing matters be set down for hearing thereafter; that this Court order and direct

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that pending hearing and final adjudication of this Court on the matters set forth in this petition, no acts or action of the petitioners shall be deemed to constitute either an adoption or rejection of said lease or of any of the agreements hereinbefore set forth; and that the Court grant such other and further relief in the premises as to it may seem necessary and proper."

Said petition is duly filed in this Court and is made a part hereof with the same force and effect as if herein set forth at length. Said petition, by an order of this Court dated September 28, 1932, will be brought on for hearing on October 3, 1932, at three o'clock P. M., in room 439,

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United States Post Office Building, Borough of Manhattan, City of New York, and said order is made a part hereof as if herein fully set forth at length, and said order has been duly filed in this Court, and the aforesaid petition and the order have been duly served on all parties to this cause.

FURTHER ANSWERING THE PETITION, YOUR RESPONDENTS SHOW:

XII. The claim for the payment of taxes of the Manhattan and the interest on the Consolidated Mortgage

Bonds are claims by a general creditor or creditors of the Interborough, and the payment of such claims must depend upon (1) the free moneys in the hands of your Receivers and (2) the priority of the claims of other creditors, general or secured.

For that purpose, and because of the matters hereinafter set forth, which will show the complicated questions of fact and accounting, as well as law, involved, your Receivers suggest to this Court that a Special Master be appointed to hear and determine the questions presented by the petition and this answer.

XIII. As evidencing the complicated and involved financial condition of the affairs of the Interborough, your Receivers give the following statement of the moneys of the Interborough now on hand and the claims against those moneys and the depletion thereof by the operation of the Manhattan division for the three months' period ending December 31, 1932, to wit:

The cash on hand in the custody of your Receivers totaled $8,289,951.84 on the morning of September 30, 1932. All of that sum is not available for the corporate purposes of the Interborough, as the following analysis will show:

As of said date the amount held in the so-called "corporate cash account" of the Receivers on hand was $1,383,345.79.

For the purposes of operating the Manhattan Division there was cash on hand in the sum of $543,420.79, making a total of $1,926,766.58.

From that last figure there must be deducted, for the vouchers in transit because of your Receivers' operation of the Manhattan Division, $49,300, leaving a sum of $1,877,466.58.

At the present time there is pending before the Court the question of the Interborough State franchise tax on

the operations of the Manhattan Division. The amount involved is $81,136.60, which, subtracted from the previous total, leaves $1,796,329.98.

On September 30, 1932, the balance of the moneys was not available, because it consisted of the following items:

(1) $5,317,468.51 held in a separate account for the purpose of operating the subway division of the Interborough. [Of this sum, $2,200,000 was payable to these Receivers and was paid to these Receivers on October 1, 1932, as hereinafter set forth.]

(2) $233,424.26, representing capital moneys which these Receivers believe are subject to the lien of the Interborough Mortgage and cannot be used for the ordinary corporate purposes.

(3) $216,833.90, representing moneys on account of the Manhattan Construction Account and which, under the Manhattan lease, must be devoted to the purpose of improving the Manhattan Elevated property.

(4) $393,443.55, a special deposit because of a lien by the City of New York under agreement of August 30, 1929, pending determination as to disputed items under the Subway Contracts.

(5) $33,428.22, a fund in trust to cover the death or disability of the employees of the Interborough, which is a payment made to those employees in the form of an insurance, to which the employees have contributed and which is in addition to the insurance afforded by the Workmen's Compensation Act.

(6) $168,586.82, representing deposits on account of coupons and dividends, which coupons and dividends are long overdue and for which the holders thereof or the persons entitled thereto have not presented their claims.

On October 1, 1932, there was deducted from the item of $5,317,468.51, pursuant to the Interborough's Contract No. 3 with the City of New York, the sum of approximately $2,200,000, and transferred to the so-called "Corporate Cash Account."

There was then available on October 1, 1932, less any deductions that were made as a result of expenditures on September 30, 1932, in the operation of the Manhattan Division, the sum of $3,996,329.98.

That figure of $3,996,329.98 comprises the sum of $1,796,-329.98, representing the cash on hand available to the Receivers for general purposes, plus the sum of $2,200,000 which the Interborough, under Contract No. 3, had the right to draw down on September 30, 1932, from the cash on hand from the Subway Division operations.

Against the available cash on October 1, 1932, there are, among others, the following claims:

(1) The lien of the City of New York against the Interborough in the sum of $510,000, for taxes and interest against Interborough property in arrears for part of the year 1928 and all of the year 1929.

(2) The material and supply bills due for a period of four months prior to the time that these Receivers were appointed, on account of material and supplies provided to the Manhattan Division, totaling approximately $594,600.

(3) Subway capital advances of approximately $200,000.

(4) The real estate and special franchise taxes of the Manhattan in the sum of $860,000, which taxes are the subject of the petition presented by the Receiver of the Manhattan.

(5) The principal and interest on the Seven Per Cent. Notes of Interborough which were due on September 1, 1932, amounting to $32,780,623.

546 *American Brake Shoe Record.*
Answer of I. R. T. Rec. to Manhattan Rec. Pet.

(6) The principal and interest on the Six Per Cent. Notes of Interborough due October 1, 1932, amounting to $10,815,000.

(7) The interest on the Four Per Cent. Consolidated Mortgage Bonds of Manhattan Railroad, plus the $25,000 administration expense, plus one-quarter of the dividends on the 43,510 shares of the Seven Per Cent. Stock of the Manhattan which did not assent to the plan of readjustment, totaling $914,802.

547 Thus, there are, against the $3,996,329.98 available, claims approximating $46,700,025.

XIV. Your Receivers are advised by their Accounting Department that the operations of the Manhattan Division for the three months' period ending December 31, 1932, or any extended period thereafter, will fail to cover the cost of operations and taxes, without providing any sum to Manhattan or the holders of its securities.

XV. Your Receivers suggest to the Court that an investigation of all the facts, under the guidance of a Special Master, will aid this Court and your Receivers in arriving at a conclusion that will be fair and equitable to all parties concerned, to the end that no one party should obtain a
548 preference to which he or it is not entitled, at the expense of some other party to this cause or to some other interest not at present in the cause.

FURTHER ANSWERING THE PETITION, YOUR RESPONDENTS SHOW:

XVI. The properties of the Manhattan covered by its Consolidated Mortgage (hereinafter called the "Manhattan mortgaged properties") are not identical with and do not cover the whole of the Manhattan Division of the Interborough. The figures set forth above in paragraph XIII

hereof account for the results of all the operations over the railroad owned by the Manhattan and the third and additional tracks constructed by the Interborough under the Manhattan Certificate, the power plant of the Manhattan as improved by the Interborough, the operation over the three lines owned by Interborough constructed under the Interborough Certificate of 1913 and known as the Webster Avenue Line, the Eighth Avenue and 162nd Street Connection, and the Queensboro Bridge Line, and the operation of the Manhattan Division trains over the portions of the Subway lines over which trackage rights were granted by the Joint Trackage Agreement of March, 1913, which lines are located on Jerome Avenue north of 162nd Street, White Plains Road north of Gunhill Road, and in the Borough of Queens east of the Queensboro Bridge, Plaza Station.

These Receivers have been advised, and verily believe, that the determination of the actual income and cost of the operation of the lines belonging to the Manhattan Company and covered by its mortgage, as culled from the income and cost of operation of the Manhattan Division, will be a most difficult and complicated task by reason of the following circumstances:

If it be assumed that such a division could be made upon the basis of cost per mile for the entire Manhattan Division—with the various types of cars in use and different character of service on the different portions of the lines, i. e., express service or local service, and in some instances a combination of both—it is impossible to make any division of those operating expenses without a most extensive study of all the conditions and circumstances surrounding such operation; to do that it would be necessary to determine the fares collected on each one of the stations of the Manhattan lines and the fares collected at the stations on the railroads built and owned by the Interborough under the Interborough Certificate. The revenue credited to the Manhattan Division in connec-

tion with the joint operation over portions of the subway lines is derived in part by use of property owned by Interborough and is determined under the provisions of the Joint Trackage Agreement.

Your Receivers have been advised that a division of the total passenger revenue of the Manhattan Division cannot be made to the Manhattan lines covered by the Manhattan mortgage and to the Interborough lines operated in connection therewith, merely upon a determination of the amount collected on such respective lines, but such division must take into consideration the point at which such
1553 passengers board trains, whether their journey is confined to the lines covered by the Manhattan mortgage and the railroads owned by the Interborough, or to the jointly operated lines, or whether it is intended to include trips over more of those lines, and what part of such lines is used for such trips.

The determination of those questions will require numerous checks upon travel and an extended study of statistics and figures that can be made only by competent engineers under the guidance of a Special Master.

XVII. Your Receivers are further advised and verily believe that the difficulties of any apportionment become apparent when consideration is given to the fact that the passenger business on the Manhattan Division for the
1554 fiscal year ending June 30, 1932, was approximately 293,000,000 passengers, with respect to which the only information available is the point of origination of the business, and in the case of the lines operated under the joint traffic arrangement even that information is not fully available.

Your Receivers are further advised and verily believe that similar difficulties arise in connection with the division of other operating revenue, amongst which may be included the sale of power and advertising and vending privileges as between the Manhattan lines and such lines

of the Interborough operated in connection therewith; the total amount of that revenue aggregates approximately $1,500,000 per year, and any equitable division thereof requires extended study and consideration.

With respect to all the matters involved, your Receivers are advised by their counsel that they will entail the application of many difficult questions of law, as well as the application of many questions of engineering and accounting, all of which can best be determined by a Special Master who can devote the necessary time required for the consideration of the many issues involved.

XVIII. Your Receivers allege that by virtue of the foregoing facts an exceptional case has been made out that would justify and warrant this Court in appointing a Special Master for the determination of the issue or issues raised by the petition and this answer thereto.

WHEREFORE your Receivers pray that this Court appoint a Special Master to determine the issue or issues raised by said petition and this answer thereto, and grant such other and further relief in the premises as to it may seem meet and just.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers for Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Receivers.

WILLIAM WALLACE,
of Counsel.

Supplemental Petition of Receivers to Receivers' Application No. 9 for Instructions Respecting October 1, 1932, Payment Under Manhattan Lease.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70 364

1559

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., Receivers of Interborough Rapid Transit Company (hereinafter referred to as "Interborough"), as and for their supplemental petition to a petition verified September 28, 1932, otherwise known as Receivers' Application No. 9, state:

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1. Heretofore and on or about September 28, 1932, William Roberts as Receiver of Manhattan Railway Company (hereinafter referred to as "Manhattan") petitioned this Court for an order directing these Receivers to pay to said Roberts as Receiver of Manhattan certain taxes that had been theretofore assessed against the property of Manhattan, and interest on the Consolidated Mortgage Bonds of Manhattan.

2. The claim for the payment of taxes of the Manhattan and the interest on the Consolidated Mortgage Bonds are claims by a general creditor or creditors of the Interborough, and the payment of such claims must depend upon (1) the free moneys in the hands of your Receivers and (2) the priority of the claims of other creditors, general or secured.

For that purpose, and because of the matters hereinafter set forth, which will show the complicated questions of fact and accounting, as well as law, involved, your Receivers suggest to this Court that a Special Master be appointed to hear and determine the questions presented by Receivers' Application No. 9 and this petition supplemental thereto.

3. As evidencing the complicated and involved financial condition of the affairs of the Interborough, your Receivers give the following statement of the moneys held by these Receivers as of September 30, 1932, and estimate of claims and indebtedness payable by Interborough (excluding claims in action), to wit:

The cash on hand in the custody of your Receivers totaled $8,289,951.84 on the morning of September 30, 1932. All of that sum is not available for the general purposes of the Receivers, as the following analysis will show:

As of said date the amount held in the so-called "corporate cash account" of the Receivers was $1,383,345.79.

For the purposes of operating the Manhattan Division there was cash on hand in the sum of $543,420.79, making a total of $1,926,766.58.

From that last figure there must be deducted, for the vouchers in transit, $49,300, leaving a sum of $1,877,466.58.

1564 *American Brake Shoe Record.*
Supplemental Petition to Application No. 9.

On September 30, 1932, the balance of the moneys was not available, because it consisted of the following items:

(1) $5,317,468.51 held in a separate account for the purpose of operating the Subway Division of the Interborough. [Of this sum, $2,200,000 was payable to these Receivers and was paid to these Receivers on October 1, 1932, as hereinafter set forth.]

(2) $233,424.26, representing capital moneys which these Receivers believe are subject to the lien of the Interborough Mortgage and cannot be used
1565 except for capital expenditures as therein provided.

(NOTE—In addition Interborough invested $700,000 of similar funds in $500,000 principal amount of New York City bonds, and in a $200,000 first mortgage on real estate which had theretofore been taken by Interborough on a sale of real estate owned by it.)

(3) $216,833.90, representing moneys in the Manhattan Construction Account and which, under the Manhattan lease, must be devoted to the purpose of improving the Manhattan Elevated property.

(4) $393,443.55, a special deposit because of a lien by the City of New York under agreement of August 30, 1929, pending determination as to disputed items under the Subway Contracts.

(5) $33,428.22, a fund in trust to cover the death
1566 or disability of the employees of the Interborough, which is a payment made to those employees in the form of an insurance, to which the employees have contributed and which is in addition to the insurance afforded by the Workmen's Compensation Act.

(6) $168,586.82, representing deposits on account of coupons and dividends, which coupons and dividends are long overdue and for which the holders thereof or the persons entitled thereto have not presented their claims.

American Brake Shoe Record.
Supplemental Petition to Application No. 9.

On October 1, 1932, there was deducted from the foregoing item of $5,317,468.51, pursuant to the Interborough's Contract No. 3 with the City of New York, the sum of approximately $2,200,000, and transferred to the so-called "Corporate Cash Account."

There was then available on October 1, 1932, less any deductions made as a result of expenditures on September 30, 1932, in the operation of the Manhattan Division, the sum of $1,077,466.58.

That figure of $1,077,466.58 comprises the sum of $1,877,466.58, representing the cash on hand available to the Receivers for general purposes, plus the sum of $2,200,000 which the Interborough, under Contract No. 3, had the right to draw down on September 30, 1932, from the cash on hand from the Subway Division operations.

Against the available cash on October 1, 1932, there are, among others, the following claims:

(1) The lien of the City of New York against the Interborough in the sum of $510,000, for taxes and interest against Interborough property in arrears for part of the year 1928 and all of the year 1929.

(2) The material and supply bills due for a period of four months prior to the time that these Receivers were appointed, on account of material and supplies provided to the Manhattan Division, totaling approximately $594,600.

(3) Subway capital advances of approximately $200,000 to December 31, 1932.

(4) The real estate and special franchise taxes of the Manhattan in the sum of $860,000, which taxes are the subject of the petition presented by the Receiver of the Manhattan.

(5) The principal and interest on the Seven Per Cent. Notes of Interborough which were due on September 1, 1932, amounting to $32,780,623.

(6) The principal and interest on the Six Per Cent. Notes of Interborough due October 1, 1932, amounting to $10,815,000.

(7) The interest on the Four Per Cent. Consolidated Mortgage Bonds of Manhattan Railroad, plus the $25,000 administration expense, plus one-quarter of the dividends on the 43,510 shares of the Seven Per Cent. Stock of the Manhattan which did not assent to the plan of readjustment, totaling $914,802.

(8) Interborough State franchise tax on operations of Manhattan Division, $81,136.60.

The foregoing claims aggregate approximately $46,800,000, but do not include claims now in action. All of such claims are subject to investigation and audit. The cash available as of September 30, 1932, to satisfy all of such claims was approximately $4,077,466.58.

4. Your Receivers are advised by their Accounting Department that the operations of the Manhattan Division for the three months' period ending December 31, 1932, or any extended period thereafter, will fail to cover the cost of operations and taxes, without providing any sum to Manhattan or the holders of its securities.

5. Your Receivers suggest to the Court that an investigation of all the facts, under the guidance of a Special Master, will aid this Court and your Receivers in arriving at a conclusion that will be fair and equitable to all parties concerned, to the end that no one party should obtain a preference to which he or it is not entitled, at the expense of some other party to this cause or to some other interest not at present in the case.

6. The properties of the Manhattan covered by its Consolidated Mortgage (hereinafter called the "Manhattan mortgaged properties") are not identical with and do not cover the whole of the Manhattan Division of the Interborough. The statements of operating results of the Manhattan Division set forth in the petition of these Receivers verified September 28, 1932, and in this supplemental petition, account for the results of operations over the railroad owned by the Manhattan and the third and additional tracks constructed by the Interborough under the Manhattan Certificate, the power plant of the Manhattan as improved by the Interborough, the operation over the three lines owned by Interborough constructed under the Interborough Certificate of 1913 and known as the Webster Avenue Line, the Eighth Avenue and 162nd Street Connection, and the Queensboro Bridge Line, and the operation of the Manhattan Division trains over the portions of the Subway lines over which trackage rights were granted by the Joint Trackage Agreement of March, 1913, which lines are located on Jerome Avenue north of 162nd Street, White Plains Road north of Gunhill Road, and in the Borough of Queens east of the Queensboro Bridge, Plaza Station.

These Receivers have been advised, and verily believe, that the determination of the actual income and cost of the operation of the lines belonging to the Manhattan Company and covered by its mortgage, as culled from the income and cost of operation of the Manhattan Division, will be a most difficult and complicated task by reason of the following circumstances:

If it be assumed that such a division could be made upon the basis of cost per mile for the entire Manhattan Division—with the various types of cars in use and different character of service on the different portions of the lines, i. e., express service or local service, and in some instances a combination of both—it is impossible to make any division of those operating expenses without

a most extensive study of all the conditions and circumstances surrounding such operation; to do that it would be necessary to determine the fares collected on each one of the stations of the Manhattan lines and the fares collected at the stations on the railroads built and owned by the Interborough under the Interborough Certificate. The revenue credited to the Manhattan Division in connection with the joint operation over portions of the subway lines is derived in part by use of property owned by Interborough and is determined under the provisions of the Joint Trackage Agreement.

577 Your Receivers have been advised that a division of the total passenger revenue of the Manhattan Division cannot be made to the Manhattan lines covered by the Manhattan mortgage and to the Interborough lines operated in connection therewith, merely upon a determination of the amount collected on such respective lines, but such division must take into consideration the point at which such passengers board trains, whether their journey is confined to the lines covered by the Manhattan mortgage and the railroads owned by the Interborough, or to the jointly operated lines, or whether it is intended to include trips over more of those lines, and what part of such lines is used for such trips.

The determination of those questions will require numerous checks upon travel and an extended study of statistics
578 and figures that can be made only by competent engineers under the guidance of a Special Master.

7. Your Receivers are further advised and verily believe that the difficulties of any apportionment become apparent when consideration is given to the fact that the passenger business on the Manhattan Division for the fiscal year ending June 30, 1932, was approximately 293,000,000 passengers, with respect to which the only information available is the point of origination of the business, and in the case of the lines operated under the joint traffic arrangement even that information is not fully available.

Your Receivers are further advised and verily believe that similar difficulties arise in connection with the division of other operating revenue, amongst which may be included the sale of power and advertising and vending privileges as between the Manhattan lines and such lines of the Interborough operated in connection therewith; the total amount of that revenue aggregates approximately $1,500,000 per year, and any equitable division thereof requires extended study and consideration.

8. With respect to all the matters involved in Receivers' Application No. 9, to which this petition is supplemental, as well as all the matters herein involved, your Receivers are advised by their counsel that they will entail the application of many difficult questions of law, as well as the application of many questions of engineering and accounting, all of which can best be determined by a Special Master who can devote the necessary time required for the consideration of the many issues involved.

9. Your Receivers allege that by virtue of the foregoing facts and the facts alleged in the said petition of these Receivers verified September 28, 1932, an exceptional case has been made out that would justify and warrant this Court in appointing a Special Master for the determination of the issues raised by said petition verified September 28, 1932, to which this petition is supplemental, and by this petition.

WHEREFORE, your petitioners respectfully pray to the Court that they may receive the instructions of the Court with respect to the payment of the amounts which have heretofore become due and payable, and which did on October 1, 1932, and thereafter, become payable by way of rental under the lease of Manhattan, and whether the operations of the Manhattan lines under the lease are such as to justify the payment of the stipulated rentals under said lease, and to that end that a Special Master

582 *American Brake Shoe Record.*
Supplemental Petition to Application No. 9.

be appointed to determine the issues raised by Receivers' Application No. 9 and the answers thereto, and this supplemental petition, and such further answers to said petition and this supplemental petition as the respective parties appearing in this cause may desire to present to such Special Master; and that the prayer for relief in Receivers' Application No. 9 be granted in full; and that the Court grant such other and further relief in the premises as to it may seem meet and just.

VICTOR J. DOWLING,
THOMAS E. MURRAY, Jr.,
583 Receivers for Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Receivers.

WILLIAM WALLACE,
of Counsel.

584

Doc. 62

Affidavit of H. M. Fisher, Treasurer for Receivers, as to Cash—Submitted in Hearing on Receivers' Application No. 9.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

H. M. FISHER, being duly sworn, deposes and says:

That on August 26, 1932, he was appointed Treasurer for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, and has since acted as such; that he is familiar with the cash accounts of said Receivers; that prior to the appointment of said Receivers he was Treasurer for Interborough Rapid Transit Company for many years, and that he has had charge of its cash and securities and is fully familiar with the accounts respecting the same.

That he caused to be prepared and attached to this affidavit as Schedule A an analysis of the moneys in the hands of said Receivers. That the purpose of this Schedule is to explain the averments in that regard appearing in the Supplemental Petition of the Receivers verified October 6, 1932. That said Schedule A consists of three sheets, and the figures on Sheet 1 of said Schedule are tied into the Supplemental Petition of the Receivers above mentioned.

1588 *American Brake Shoe Record.*
Affidavit of H. M. Fisher.

Sheet 1

This sheet is meant to explain the nature of the cash in the hands of the Receivers on the morning of September 30, 1932.

It begins with a total of $8,289,951.84. It then explains more specifically than in said Supplemental Petition the five special accounts, the moneys in which are included in the above total sum, which five items are available only for the special purposes for which each account was created. These five items total $1,045,716.75. After setting them apart, the moneys remaining are $7,244,235.09.

1589 Then follows an explanation of cash in the subway operating account, in which on September 30, 1932, there was $5,317,468.51, which moneys could not be used for any purpose save as provided in the contract, pursuant to which said account was originated and maintained. From this account the Receivers withdrew on October 1, 1932, as part of the net preferential due from the subway, in accordance with the terms controlling said account, $2,200,000. After setting apart the balance in this subway account (above the amount of this withdrawal), which balance amounts to $3,117,468.51, there remained of the $7,244,235.09 above referred to, $4,126,766.58. From this sum there had to be deducted $49,300 of unpaid voucher obligations then in transit, leaving a balance of $4,077,466.58, which is the so-called general available cash

1590 referred to on page 397 of said Supplemental Petition.

On September 30, 1932, this amount was held in two accounts as follows: (1) a general purpose account amounting to $1,383,345.79, which is increased as of October 1, 1932, by $2,200,000, being the amount transferred from the subway operation account above referred to, making a total of $3,583,345.79; and (2) an account available for operating the Manhattan Division, $543,420.79, less unpaid vouchers of $49,300, or a net of $494,120.79. This sum of $494,120.79 includes the $357,305.12 in the account for the Manhattan Division operations on August 26, 1932, the date of appointment of the Interborough Receivers.

American Brake Shoe Record
Affidavit of H. M. Fisher.

Sheet 2

This shows the expected cash available for the period August 26, 1932, to December 31, 1932.

The first item consists of the amount in the general account, being the amount referred to on Sheet 1, i. e., $3,583,315.79. Next follows the net amount in the account for the Manhattan Division on September 30, 1932, $494,120.79. Next follows the amount of the estimated earnings of the Manhattan Division from September 30, 1932, to December 31, 1932, $412,500. This figure is arrived at by deducting from the estimate of cash results of operation of Manhattan Division for period August 26, 1932, to December 31, 1932, which is shown on Sheet 3, the portion of the net revenues for the period August 26, 1932, to September 30, 1932. Next follows an item of $1,375,000, being the remainder of the September 30, 1932, preferential under subway contracts which is estimated will be available from current operations prior to December 31, 1932. The next item is the entire December 31, 1932, preferential under the subway contracts, which is estimated will be available on December 31, 1932, approximately $3,575,000.

The foregoing five items aggregate $9,439,966.58.

Against this cash, the claims and indebtedness of the Interborough Company matured or maturing on or prior to January 1, 1933, without including claims for personal injuries or other litigated claims, and including cash capital requirements under subway contracts, are set forth.

The first item consists of real estate taxes of the Interborough for 1928 and 1929 in arrears, amounting to $510,000.

The second item is that of past due supply bills payable on account of Manhattan Division operations, amounting to approximately $594,600.

The third item is that of capital expenditures on the subway under contract with the City to December 31, 1932, amounting to $200,000. Capital expenditures are

constantly required to be made for improvements, etc., and it is necessary to make provision therefor.

The fourth item represents the interest and principal on the 7% Secured Gold Notes of the Interborough Company due September 1, 1932, which, after including interest to January 1, 1933, amounts to $33,519,300.

The fifth item represents the interest and principal on the 6% Notes of the Interborough Company due October 1, 1932, which, after including interest to January 1, 1933, amounts to $10,972,500.

The sixth item represents interest and sinking fund on the First and Refunding Mortgage Bonds of the Interborough Company due January 1, 1933, which is estimated at $5,000,000. There are approximately $132,000,000 principal amount of these bonds in the hands of the public, and there are an additional $54,989,000 of these bonds pledged to secure the above-mentioned 7% Gold Notes of the Interborough Company.

The foregoing six items aggregate $50,796,400.

There have not been included in the foregoing the following items respecting the Manhattan Division, aggregating $2,743,136.60:

Manhattan Division real estate taxes for 1932, $1,720,000; I. R. T. Franchise Tax on account of "El" operations, past due, $81,136.60; payment due to the City under the Manhattan Certificate, $17,200; the Manhattan administration expenses, $25,000; Federal Income Tax of Manhattan, $10,000; dividend rental on Manhattan Unmodified 7% Stock, $76,140; and six months' interest due October 1, 1932, on Manhattan Consolidated Mortgage Bonds, $813,660.

Nor has there been included any amount on account of any expenditures which might be necessary should the Transit Commission's orders for additional equipment and lengthening of platforms be sustained by the courts.

OLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Doc. 64
Opinion No. 1

Opinion on Petitions of Interborough Receivers and of Manhattan Receiver as to Payment of Past-Due Taxes and Interest Due October 1, 1932, on Manhattan Bonds.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY *et al.*, Defendants.	In Equity E 70-364

MEMORANDUM

MANTON, J.:

16

The receivers were heretofore appointed and have qualified for the Interborough Rapid Transit Company and for the Manhattan Elevated Railway Company and are now in possession of their respective properties.

The receivers for the Interborough Company operate the system of both companies, the elevated railway property of the Manhattan Company being operated under a lease to the Interborough Company.

American Brake Shoe Record.
Opinion No. 1.

On the 28th of September, 1932, the receiver of the Manhattan Company petitioned this court for an order directing the receivers of the Interborough Company to pay the receiver of the Manhattan Company certain taxes which had theretofore been assessed against the property and interest on the Consolidated Mortgage Bonds of the Manhattan Company falling due on October 1, 1932. This petition for payment of interest and taxes is based upon the claim that the receivers of the Interborough Company have free moneys on hand, which might be used in payment of these items or might be an advance so that the Manhattan receiver may pay the interest on the Consolidated Mortgage Bonds.

The receivers for the Interborough Company appeared and asked instructions, first petitioning that a special master be appointed to hear and determine the questions presented by such receivers in their application (No. 9) and a supplemental petition filed thereto. In their petition, the receivers for the Interborough Company point out the involved financial condition of that company and a statement of the moneys held by them on September 30, 1932, with an estimate of claims and indebtedness payable by the Interborough Company. It is pointed out that cash on September 30, 1932, is $8,289,951.86 and that all of this sum is not available for the general purposes of the receivers. The following analysis is submitted:

As of that date the amount held in the so-called corporate cash account of the receivers is	$1,383,345.79
For the purpose of operating the Manhattan Division there was on hand cash in the sum of	543,420.79
Making a total of	$1,926,766.58
From which there must be deducted vouchers in transit amounting to	49,300.00
Leaving a balance of	$1,877,466.58

But this balance is not available because is consists of the following items:

$5,317,468.51 held in a separate account for the purpose of operating the subway division of the Interborough Company and of this sum:

(1) $2,200,000 is payable to said receivers and was paid to them on October 1, 1932, as set forth;

(2) $233,424.26 representing capital moneys which the receivers believe are subject to the lien of the Interborough mortgage cannot be used except for capital expenditures as therein provided;

(3) $216,833.90 representing moneys in the Manhattan construction account under the Manhattan lease must be devoted to the purpose of improving the Manhattan elevated property;

(4) $393,443.55 is a special deposit because of the lien by the City of New York under agreement of August 30, 1929, pending the determination as to despatch items under the subway contracts;

(5) $33,428.22 a fund in trust to cover the death or disability of employees of the Interborough Company, which is a payment to those employees in the form of an insurance to which the employees have contributed and which is an addition to insurance under the Workmen's Compensation Act;

(6) $168,585.82 represents deposits on account of coupons and dividends, which coupons and dividends are long overdue and for which the holders thereof or the persons entitled thereto have not presented their claims.

On October 1, 1932, there was deducted from the item of $5,317,468.51, pursuant to the Interborough Company's Contract No. 3 with the City of New York, the sum of $2,200,000, having been transferred to the so-called corporate cash account. There was then available on October

1, 1932, less any deductions made as a result of expenditures on September 30, 1932, in the operation of the Manhattan division, the sum of $4,077,466.58. This latter sum includes $1,877,466.58, representing the cash on hand available to receivers for general purposes, plus the sum of $2,200,000 which the Interborough Company under Contract No. 3 had the right to draw down on September 30, 1932, from the cash on hand from the subway division operation.

Against the available cash on October 1, 1932, there are items as follows:

Due the City of New York against the Interborough Company for taxes on Interborough property in the sum of.....	$ 510,000.
Supply and materials bills on account of materials and supplies to the Manhattan division	594,600.
Subway capital advances to December 31, 1932, of approximately.....	200,000.
Real estate and special franchise taxes of the Manhattan Company in the sum of.. (which taxes are the subject of the petition presented by the receiver of the Manhattan Company).	860,000.
Principal and interest on 7% notes of the Interborough Company due September 1, 1932	32,780,623.
Principal and interest on 6% notes of the Interborough Company due October 1, 1932	10,815,000.
Interest on the 4% Consolidated Mortgage Notes of the Manhattan Company, plus $25,000 administration expenses, plus ¼ of the dividend on 42,510 shares of 7% stock of the Manhattan Company which did not assent to the plan of readjustment, due October 1, 1932, totaling.....	914,802.
Interborough Company state franchise tax on operation of the Manhattan division is also due, amounting to.....	81,126.60

Counsel representing the Manhattan Company receiver and the trustee under the Consolidated Mortgage have

argued for the payment of the interest on the mortgage, claiming that funds are available to the Interborough Company receivers which may be used for that purpose.

On the return day of the respective petitions, October 3, 1932, it was thought that advances might be made to meet this interest obligation of the Consolidated Mortgage of the Manhattan Company and that the payment of taxes might be deferred until the receivers were in receipt of further funds. At that time it was suggested by the court that a statement be prepared setting forth the factual situation as to the financial position of the receivers in the matter of funds and obligations. When this statement appeared and on the settlement of the proposed order, it became clear that it would be necessary to take proof before a master to ascertain the facts so that the court might be advised and better informed before directing the payment of the interest on the mortgage bonds or directing an advance to the Manhattan Company receiver to meet this obligation which might later be repaid as an item of reasonable rent for use and occupation or as a set off for rent during the trial period of operation by the receivers before the lease was affirmed or disaffirmed or to be charged against net profits of operation in the event of a disaffirmance or against the rental obligations in the event of an affirmance of the lease. (Penn. Steel Co. v. N. Y. Ry. Co., 198 Fed. 721; Amer. Brake Shoe Co. v. N. Y. Railway Co., 282 Fed. [2d] 547.)

Counsel for the noteholders' committees of Interborough Company have presented figures from which they argue that the Manhattan Elevated Railway Company during that period will be operated at a loss and that there will not be net profits from operation which might be used to repay the advances made by the receivers of the Interborough Company. For these reasons, it is said that proper protection cannot be given to the receivers of the Interborough Company and that, if payment were made a preference might be granted to the creditors of the Manhattan Company, namely, the bondholders. And it is

argued that reservation of the rights and equities can be effectively decreed only if a fund is available or there is a reasonable estimate that a fund will be available to satisfy such rights and equities when they are determined.

The receivers for the Interborough Company estimate the Manhattan division's income from April 1, 1931, to April 1, 1932, shows approximately $130,000 available and the estimate for the next six months ending March 31, 1933, shows a deficit of $193,000 instead of a fund created by the operation of the property for payment of the interest to the Manhattan Company's mortgage creditors. It
31 would thus appear that there would be a deficit. There is interest accruing on the $4,500,000 second mortgage of the Manhattan Company.

From the statement of the Interborough Company receivers, it appears that cash on hand was derived principally from the subway division and to a less extent from the Manhattan division, the amount of which is not made clear. Within the next four months the Interborough Company receivers will have to make provision for the payment of the sums above referred to. There is uncertainty as to their ability to do so. But in any case, upon the record now before me showing cash on hand and the allegations thereof, prospective earnings and operating expenses it would appear unwise to advise the receivers at this time to make the payments.

32 In order to avoid the granting of a preference by making advances which the Manhattan Company may not be able to return, it is a better course to refer the matter to a special master who will take testimony and make his report before the 60-day period under the terms of the Consolidated Mortgage of the Manhattan Company has expired.

An order will, therefore, be entered referring the matter to a special master with directions to make his report within the time specified. Upon the receipt of that report, counsel will be heard further on the petition to pay the interest and taxes.

(Filed in Clerk's Office, October 11, 1932.)

Doc. 65

Answer of Central Hanover Bank and Trust Company, as Trustee, to Petition of Interborough Receivers, Verified September 28, 1932.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. E 70-364

1

To the Honorable, the Judges of the District Court of the United States for the Southern District of New York:

Now comes Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company, and answers the petition herein of 16
Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, verified September 28, 1932, as follows:

I. It denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in said petition, except as hereinafter set forth.

American Brake Shoe Record.
Answer of Central Hanover to Petition.

II. It is informed and believes that the allegations contained in paragraphs 1, 3, 5, 6, 7, 8, 11 and 14, which refer to certain instruments, copies of which are alleged to be annexed to said petition, are in most respects true and correct, but for a full and proper statement of the contents and effect of said instruments, petitioner prays reference to said instruments or to copies which this respondent may have the opportunity to verify as correct.

III. It admits that under date of January 1, 1903, Manhattan Railway Company (hereinafter referred to as Manhattan) entered into a lease with the defendant herein (hereinafter referred to as Interborough), pursuant to which Manhattan leased its property as therein provided; that included in the property leased were the elevated railroad lines known as the Ninth Avenue line, the Third Avenue line, the Second Avenue line, and the Sixth Avenue line; that, by the terms of Articles Sixth and Seventh of said lease, Interborough agreed to make the payments therein provided for, and in addition agreed to pay, among other things, all taxes and assessments levied or imposed against the Lessor, its stock or dividends or railroads or other property; that on or about March 19, 1913, the Public Service Commission for the First District issued to Manhattan a certificate authorizing the construction of additional tracks on its Second Avenue, Third Avenue and Ninth Avenue elevated lines, and that said certificate was subsequently amended by certificate dated May 22, 1914; that on May 31, 1932, there became due and payable certain real estate taxes and special franchise taxes on property of Manhattan, and that on June 22, 1932, Manhattan demanded that Interborough pay said taxes or deposit in a bank or trust company the amount thereof; that on October 1, 1932, there will become payable a semi-annual installment of interest amounting to $813,660 upon the outstanding $40,683,000 Consolidated Mortgage 4% Bonds of Manhattan.

Further answering this respondent refers to and makes a part hereof the petition herein of this respondent to be submitted herewith upon the hearing under the petition to which this answer is made.

WHEREFORE, this respondent prays that such relief be granted herein as is prayed for in last-mentioned petition.

Dated, October 1, 1932.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee under Consolidated Mortgage of
Manhattan Railway Company,
By DAVIES, AUERBACH & CORNELL,
Its Solicitors.

H. C. MCCOLLOM,
Counsel.

Doc. 66

Petition of Chadbourne, Stanchfield & Levy to Terminate Their Appointment and Employment as Solicitors and General Counsel for the Interborough Receivers.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1643

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,

against

INTERBOROUGH RAPID TRANSIT COMPANY *et al.*,
Defendants.

To the Honorable Martin T. Manton, U. S. Circuit Judge Designated to Hold a Term of the District Court for the Southern District of New York:

1. At the time of the appointment of Messrs. Dowling
1644 and Murray as temporary receivers in the above-entitled suit on August 26, 1932, my firm of Chadbourne, Stanchfield & Levy was designated by the court to serve as solicitors for said temporary receivers. An order to show cause was then entered, directing that a hearing to parties and all other persons interested upon the question of the appointment of permanent receivers be had on September 22nd, of which hearing notice was widely published and served upon all the parties who had appeared. At the

time of the hearing on September 22nd, no objection whatever was made by anyone to the designation of my firm or their continuance as solicitors for the receivers as aforesaid, and we have continued to serve in that capacity.

2. Since the appointment of said temporary receivers on August 26th as aforesaid, there has been public criticism of our appointment as solicitors for the receivers on the ground, among other things, that my firm and I personally have heretofore represented creditors of the Interborough Company; that I have heretofore been personally interested in securities of the Interborough and Brooklyn-Manhattan Companies; and that my firm has acted as attorneys for the Brooklyn-Manhattan Company, and it has been urged that such representation or interest constituted an objection to my firm serving as solicitors for the receivers of the Interborough Company.

I believed and understood at the time of our appointment by the court as solicitors for the temporary receivers that my past interests in and associations with these two companies were matters of record and public knowledge and well known to the parties to this suit and others interested in the subject matter.

3. The receivership in the above-entitled suit is one of the most important that has ever been instituted in this circuit. Property interests of over six hundred millions of dollars in securities or value are involved and the rights of many thousands of security holders. It is, of course, important to all interests, whether as creditors or stockholders, or the public at large, that there be an orderly and prompt administration of such a receivership and that no extraneous matters should arise which would deflect attention from the substantial issues involved.

I had supposed that my well-known connection with traction matters in New York and the resulting knowledge

and experience which I gained thereby would be helpful to the efficient administration of this receivership.

4. I and the members of my firm have determined that the criticisms made of us as solicitors for the receivers, although unjustified, may embarrass and delay and continue further to embarrass and delay the prompt, orderly, economical and effective administration of the Interborough receivership, and we have, therefore, concluded that the adequate and due administration of this receivership is more important than the continuance of any particular solicitors for the receivers and that it is in the public interest that this irrelevant issue should be eliminated. For these reasons, we have determined to discontinue our employment as solicitors for the receivers of the Interborough Rapid Transit Company and respectfully pray that other solicitors be appointed in our place and stead.

All of which is respectfully submitted.

New York, October 10, 1932.

(Sgd.) THOMAS L. CHADBOURNE,
CHADBOURNE, STANCHFIELD & LEVY.

Doc. 66c

Affidavit by Nathan L. Miller, of Hornblower, Miller, Miller & Boston, Solicitors and General Counsel for the Interborough Receivers.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY, *et al.*,
Defendants.

Before the Honorable Martin T. Manton, United States Circuit Judge Designated to Hold a Term of the District Court of the United States for the Southern District of New York:

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

NATHAN L. MILLER, being duly sworn, deposes and says:

I am a member of the firm of Hornblower, Miller, Miller & Boston, attorneys and counsellors at law, whose office is at 15 Broad Street, Borough of Manhattan, City and State of New York, and I have been a member of said firm for approximately two years; that the partners of said firm, in addition to deponent, are William W. Miller, Charles A. Boston, Carl M. Owen, Harold Otis, Edward C. Bailly, H. Bartow Farr, Raoul E. Desvernine, Harold H. Corbin, Harold J. Gallagher, Charles M. Walton, Jr., and Claude M. Terrell.

To the best of my knowledge, I have had no business, professional or other connection and neither the said firm

nor the members thereof have had any business, professional or other connection during one year prior and up to the date of this affidavit with the subject matter of the suit herein, the parties hereto, the solicitors for the parties hereto, any creditor of the defendant herein, or any other person interested in this cause or in the receivership estate.

Deponent has not nor has the said firm of Hornblower, Miller, Miller & Boston or any of the members of said firm, appeared in this cause for or acted in this cause for a party or for any creditor of the defendant herein, whether an intervenor or not, or for any other person interested in the cause or the estate.

Deponent has been admitted to the bar of this court and has practiced at the bar of this court for many years; deponent is also a member of the bar of the State of New York and of the United States Circuit Court of Appeals for the Second Circuit and of the Supreme Court of the United States. Deponent and members of his firm have had extensive experience and familiarity with the principles and practices likely to be involved in this cause, having acted as solicitors for the receivers in other receiverships of a similar character to the receivership herein, such as for example, the receivership of the Brooklyn Rapid Transit Company (in this court), the Chicago, Milwaukee & St. Paul Railroad Company and the Seaboard Airline Railway Company.

NATHAN L. MILLER.

Subscribed and sworn to before me
this 11th day of October, 1932.

MAE J. CANNON,
Notary Public,
Kings County.
Kings County Clerk's No. 92.
Register's No. 4088.
N. Y. County Clerk's No. 166.
Register's No. 4C85.
My commission expires March 30, 1934.

Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Defendants.*	IN EQUITY E 71-153 1932.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

J. OSGOOD NICHOLS, being duly sworn, deposes and says:

1. I am an attorney at law, a member of the bar of the State of New York and of this Court, and am familiar with the matters hereinafter referred to.

2. It appears from the records in the United States District Court for the Southern District of New York that

1660 *Affidavit of J. Osgood Nichols.*

E. Henry Lacombe, when Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Judicial Circuit, pursuant to Section 18 of the Judicial Code (now Title 28, Section 22 of the United States Code), entered an order in the year 1912, and one each in the years 1913, 1914 and 1915, designating himself to hold a District Court for the Southern District of New York; that H. G. Ward, when Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Judicial Circuit, pursuant to said Section 18 of the Judicial Code, in the years 1918 and 1919 similarly
1661 designated himself to hold a District Court for the Southern District of New York; that Henry Wade Rogers when Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Judicial Circuit, pursuant to said Section 18 of the Judicial Code, in the year 1923 similarly designated himself to hold a District Court for the Southern District of New York once in that year; and that Charles M. Hough, when Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Judicial Circuit, in the year 1926 similarly designated himself to hold a District Court for the Southern District of New York.

Attached hereto are copies of said orders. It will
1662 be observed that in the orders entered by Judge Lacombe January 17, 1913, he designated himself to hold a District Court in specific suits pending in that Court.

Under date of March 20, 1930, Senior Circuit Judge Martin T. Manton designated himself to hold a District Court in the Southern District of New York. A copy of that order is attached hereto.

2a. I am informed by William F. Caverly, who has made a diligent search of the records in the Court for the Southern District of New York, that there is not in the files of that Court any record of an assent to or approval of Equity Rules 1-a and 11-a of the District Court for the

Southern District of New York, by a majority of, or by any of, the Circuit Judges for the Second Judicial Circuit.

3. I am informed and believe that Senior Circuit Judges in the First Judicial Circuit have, since the enactment of said Section 18 of the Judicial Code of the United States (now Title 28, Section 22 of the United States Code) frequently designated themselves to hold District Courts in the First Judicial Circuit, and that several times such Senior Circuit Judges, when holding District Courts, have appointed receivers in equity. In the same period of time, in the Third Circuit, Senior Circuit Judge Buffington has frequently designated himself to and has held a District Court. In the Fourth Circuit, Senior Circuit Judges, in the same period of time, have appointed themselves sixteen times to hold a District Court, and in three of such instances the designation orders have designated the Senior Circuit Judge to hold the District Court to conduct proceedings in specifically named suits. During the same period, in the Seventh Circuit, Senior Circuit Judge Baker often assigned himself to sit as a District Judge. The present Senior Circuit Judge of the Seventh Circuit, Circuit Judge Alschuler, at the beginning of each term, designates all the Circuit Judges, including himself, to sit in the District Court for the Northern District of Illinois, so that, as occasion arises, he or any other of the Circuit Judges can enter orders and hear cases in the District Court. Judge Alschuler, under such designation orders, has often heard cases in that District Court and entered orders. He has also designated himself to hold a District Court in Wisconsin. In the Eighth Circuit, in 1928, Senior Circuit Judge Stone designated himself to hold a District Court, and held the District Court for one week. Since the organization of the Tenth Circuit on April 1, 1929, the Senior Circuit Judge has on one

occasion designated himself to hold a District Court and acted pursuant to such designation. The sources of this information are communications from various attorneys having offices in the cities in which the sessions of the several Circuit Courts of Appeals are held, who have communicated with the Clerks of the District Courts of such cities, or examined the designation orders on file in those District Courts. A copy of an order by Judge Waddill, designating himself to sit in a particular removal proceeding, is attached hereto.

4. I am informed that since the beginning of the year 1931 and up to the present time, twenty-nine United States District Judges, regularly appointed to Districts other than the Southern District of New York, have been designated to hold a District Court in the Southern District of New York. Recently, in April and May, 1929, two additional judgeships were created for the Southern District of New York, to relieve the congestion therein.

5. In the New York Times for October 6, 1931 it was stated that in the report of the conference of the Senior Circuit Judges, signed October 5, 1931 by Chief Justice Hughes, speaking of the heavy calendars in some of the district courts, it was said:

> "In some districts there is a serious condition which demands relief * * * It is deemed undesirable that except where absolutely necessary judges should be called to service outside their circuit."

He also said, in the same report, as also quoted in the New York Times for October 6, 1931:

> "the congestion in the federal district courts * * * continues to be a major problem."

In his annual report for 1931, the Attorney General of the United States, speaking of the congestion in the Southern District Court for New York, said (at page 4):

"In that district both civil and criminal dockets are terribly congested. Private litigants are suffering from delay."

In the New York Times for October 4, 1932, the following appeared:

"JUDGES DEMAND LAWS TO SPEED UP APPEALS

Conference at Washington Urges Court Power to Eliminate 'Excessive Delays.'

WASHINGTON, Oct. 3 (A. P.).—Judges of the nation's senior circuit courts today declared in favor of legislation to speed up the machinery of the law by avoiding undue delays in cases under appeal.

In a report on their annual judicial conference made public by Chief Justice Charles Evans Hughes, they approved a measure pending in Congress to give the United States Supreme Court power to prescribe rules for proceedings in criminal cases after verdict.

The legislation also was favored by Attorney General Mitchell, who expressed the view that under it rules could be framed to eliminate 'excessive delays' of from nine months to three years that may intervene between a verdict and the final mandate upon appeal.

At the same time the conference said 'it is especially noteworthy that there has been a decrease of 4,775 in the number of criminal cases pending' in the year, although cases begun numbered 92,174 against 83,747 the previous year.

It also called attention to figures from the Attorney General showing that prohibition cases pending at the close of the last fiscal year totaled 15,360 against 18,555 the previous year, although there was an increase of 8,555 in the number of these cases instituted.

A resolution was adopted urging district judges to accept willingly assignments outside their districts when the senior circuit judge

should find such action necessary to prevent congestion.

The working of the probation law was commended by the conference and its further extension was recommended, especially in cases where the punishment is one year or less.

The conference approved pending legislation that would make the husband or wife of a person charged with crime in the Federal courts a competent, but not compellable, witness for or against the accused.

The group renewed its recommendation for the appointment of two additional judges in the
1673 Southern District of New York, two in the Southern District of Texas and one each in Eastern New York, Northern Georgia, West Virginia, Southern Texas and Western Missouri.

In addition it urged legislation that would permit vacancies to be filled by new appointments when certain temporary judgeships created by Congress expire by retirement of the incumbents."

6. In the New York Times for June 30, 1932, it was reported that expenses of the federal courts in the Second Circuit would be drastically reduced. No money, it was reported, would be appropriated for expenses of travel and subsistence for law clerks and stenographers
1674 and it was further reported that travelling judges' expenses for subsistence would be reduced from $10 per day to $6 per day. It was hoped that there would be sufficient funds after October 1, 1932 to authorize a reasonable amount of travelling expenses for law clerks and stenographers to judges.

7. The New York Times for July 6, 1932, contained the following:

"Outside Federal Judges Refuse to Sit Here as Economy Order Cuts Their Allowances.

Five judges instead of the customary nine were sitting yesterday in Federal Court at the beginning of a heavy July calendar and the generally

accepted explanation for this at the Federal Building was that the economy order, issued by the Attorney General last month, had influenced many jurists from other districts not to accept invitations to sit here. That order reduces expense allowances of visiting judges from $10 a day to $6.

Only one judge from out of town has accepted an invitation to sit here during the month of July, while some of the local judges are on vacation.

The judge who accepted the invitation is Judge Isaac M. Meekins of North Carolina, who is scheduled to arrive here to help relieve the congested calendars on July 25.

Only three other judges—T. Blake Kennedy of 1676
Wyoming, Robert R. Nevins of Ohio and Harry B. Anderson of Tennessee—have consented to serve here for any month of the Summer season and these judges are not scheduled to report until September.

In past years the beginning of the July term found from twelve to sixteen judges sitting in this district and of these most were visiting jurists, who billed the government not only for their own traveling expense, but for the traveling expenses of their clerks, stenographers or secretaries.

The new order, it is said, not only makes visiting to this district prohibitive, but inasmuch as traveling expenses are denied to clerks and secretaries the jurists feel that their own services would 1677
be hampered."

8. In the order by which Judge Manton appointed receivers for Interborough Rapid Transit Company in the suit of American Brake Shoe and Foundry Company against Interborough Rapid Transit Company, In Equity E-70-364 (hereinafter sometimes referred to as the American Brake Shoe suit), now pending in this Court, it was provided as follows:

"And it is further ordered that the parties hereto show cause before the undersigned at Room 439 at the United States Post Office Building in the City of New York on the 22nd day of September,

1678 1932, at 10:30 o'clock in the forenoon, why the said receivership should not be continued during the pendency of this suit and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard."

8a. In Judge Manton's order dated September 6, 1932, entered in the same cause, extending the receivership to Manhattan Railway Company and its property and assets and appointing a temporary receiver therefor, it was provided:

1679 "AND IT IS FURTHER ORDERED, that the parties hereto show cause before the undersigned at Room 439 at the United States Post Office Building in the City of New York on the 22nd day of September, 1932, at 10:30 o'clock in the forenoon, why the extension of said receivership to said Manhattan Railway Company and its said property and assets should not be continued during the pendency of this suit and upon the hearing thereon any other creditors of the defendant or other party in interest may be heard."

On September 13, 1932, there was given public notice of said hearing to be held on September 22, 1932, in the New York Evening Post. A hearing was held in accord-
1680 ance with the foregoing on September 22, 1932, before Judge Manton. At that hearing objections to the continuance of the receivership were made by the following and no other persons: Elon S. Hobbs, an attorney, who stated that he was appearing for himself and others; an attorney, James P. Kohler, who appeared for himself as the owner of $6,000 face value of 7% Notes of Interborough and $2,500 face amount of certain Manhattan securities; and Marshall & Wehle, as attorneys for a committee for holders of unmodified stock of Manhattan, who stated that they were not asking for the termination of the Interborough receivership but were making a motion to terminate the Manhattan receivership. At the

close of the hearing Judge Manton announced that he would continue the receivership, and on September 28, 1932, he entered a formal order to that effect continuing the Receivers Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of Interborough Rapid Transit Company (hereinafter for convenience referred to as Interborough) and William Roberts as Receiver of Manhattan Railway Company (hereinafter for convenience referred to as Manhattan).

9. I am informed and believe that the receivership of Interborough is the most important receivership that has ever occurred in New York. The Interborough Company has outstanding capital stock amounting to $35,000,000, outstanding first mortgage bonds in the amount of $132,000,000, in addition to $54,000,000 of such bonds pledged to secure $31,000,000 of 7% Gold Notes. In addition, the Company has outstanding $10,500,000 of 6% Gold Notes. In those receivership proceedings there is also involved the receivership of Manhattan, which has outstanding capital stock of $60,000,000, outstanding first mortgage bonds of $40,683,000 and outstanding second mortgage bonds of $4,523,000. The investment of the City of New York in the subways, which are operated by the Interborough Rapid Transit Company, is, according to a recent statement by the Corporation Counsel of the City of New York, over $300,000,000. The Interborough subway and elevated system employs more than 18,000 men, and its railroad lines last year carried over 1,000,000,000 passengers. The Interborough has 54.57 miles of railroad trackage, and 170.34 miles of single track, located within the Southern District of New York; and 32.31 miles of route mileage, and 62.95 miles of single track, located within the Eastern District of New York. The Manhattan Company owns 42 miles of railroad trackage, and 139 miles of single track, all located within the Southern District of New York.

1684 *Affidavit of J. Osgood Nichols.*

10. By orders of court in the *American Brake Shoe* suit, the following have intervened:

(1) A Committee constituted and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes, of which Notes there are outstanding in the hands of the public more than $31,672,100.

(2) A Committee for Interborough Rapid Transit Company First and Refunding Mortgagee 5% Gold Bonds, of which Bonds there are out-
1685 standing in the hands of the public more than $132,000,000.

(3) A Committee for the Protection of the Holders of Ten-Year Six Per Cent Gold Notes due October 1, 1932, of Interborough Rapid Transit Company, of which Notes there are outstanding in the hands of the public more than $10,500,000.

(4) A Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, of which Bonds there are outstanding in the hands of the public more than $40,683,000.

(5) A Protective Committee for 7% Guaran-
1686 teed Stock of Manhattan Railway Company, of which Stock there is outstanding in the hands of the public more than $4,351,000.

(6) Central Hanover Bank and Trust Company as Trustee under the Consolidated Mortgage of Manhattan.

There are pending before or have been decided by Judge Manton in that suit, among others, the following matters:

(1) A petition by the Receivers of Interborough for instructions respecting payments of

large sums of money under the lease agreements between Manhattan and Interborough.

(2) A petition by the Receiver of Manhattan for an order directing the Receivers of Interborough to pay interest due under the Interborough-Manhattan lease agreements.

(3) A petition by the Trustee of Manhattan's Consolidated Mortgage Bonds for the appointment of a receiver of the property of Manhattan subject to the mortgage securing such bonds and impounding of alleged income of Manhattan.

(4) An application by the Receivers of Interborough for instructions with respect to making a demand upon Guaranty Trust Company for payment of moneys held by Guaranty Trust Company under sinking fund provisions of the First and Refunding Mortgage of Interborough.

The records of all of the proceedings had heretofore in the American Brake Shoe action in the Southern District of New York, and in the ancillary proceedings in the American Brake Shoe action in the Eastern District of New York, are attached hereto, marked Exhibits A and B respectively, and made a part of this affidavit as fully as if set out herein in full.

11. I am informed and believe that Victor J. Dowling, one of the two Receivers of the Interborough Rapid Transit Company appointed by Judge Manton, is one of the leading jurists of New York State. He has practiced law since 1887. He became a Justice of the New York Supreme Court in 1905, and in 1910 Governor Charles Evans Hughes designated him Justice of the First Department of the Appellate Division of the State of New York. He was redesignated to that position by Governor Whitman in 1915 and by Governor Smith in 1920. He became Presiding Justice of that court in

1690 1927 and held that position until 1931, during which time he was, as Presiding Justice, the executive head of the courts in this department, displaying marked and universally approved ability in the discharge of those executive and administrative functions. He is a Vice-President of the Association of the Bar of the City of New York and a director of the New York County Lawyers Association. He was appointed by Governor Roosevelt and is now acting as a member of the New York State Commission on the Administration of Justice. Until recently he was a director of The Equitable
1691 Life Assurance Society, but after his appointment as a Receiver of the Interborough Rapid Transit Company, he resigned that directorship, because The Equitable Life Assurance Society was interested in securities of the Manhattan Railway Company.

I am informed and believe that Thomas E. Murray, Jr., is an engineer of long experience and high repute, having recently received distinguished academic honors as an engineer; he is the President of Metropolitan Engineering Company, and of Metropolitan Device Company and Chairman of the Board of Thomas E. Murray Inc., consulting engineers, and as such has had much experience with the affairs and operations of public
1692 utilities.

12. On August 29, 1932, a bill was filed in this Court entitled "Harry Barber, Complainant, against Manhattan Railway Company, Interborough Rapid Transit Company, subject to leave of Court, Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of the Interborough Rapid Transit Company, and The City of New York, Defendants, In Equity, No. E 71-39", wherein the complainant, Harry Barber, asked that a receiver be appointed for Manhattan Railway Company (hereinafter sometimes referred to as "Manhattan").

13. Prior to the filing of the Barber bill and on or about August 25, 1932, the American Brake Shoe suit

had been begun by the filing of a bill against Interborough Rapid Transit Company, Defendant, In Equity E 70-364. That bill asked for the appointment of Receivers of the defendant Interborough Rapid Transit Company (hereinafter sometimes referred to as Interborough). On the bill and the answer by Interborough which expressly admitted the allegations of the bill and consented to the appointment of a receiver therein, Circuit Judge Martin T. Manton, holding a District Court for the Southern District of New York, appointed Victor J. Dowling and Thomas E. Murray, Jr., temporary Receivers of Interborough and of its property and assets, on August 26, 1932.

14. Said receivers of Interborough Rapid Transit Company were named as parties defendant in the bill in the suit brought by Barber, and Barber, by his attorney, Lawrence Berenson, on August 29, 1932, procured an order from Circuit Judge Manton permitting Interborough and those receivers to be made parties defendant in Barber's suit; said order was entered pursuant to a petition by Barber, sworn to by Lawrence Berenson, which alleged that Victor J. Dowling and Thomas E. Murray, Jr., "were duly appointed Receivers" of Interborough, and which also alleged that the order appointing such Receivers contained provisions restraining the institution or prosecution of suits against Interborough Rapid Transit Company. At the same time Judge Manton, on the petition of Barber, sworn to by his attorney, Lawrence Berenson, entered an order, directing the defendants named in the Barber bill, to show cause, returnable at 10:30 o'clock in the forenoon on September 6, 1932, before Judge Manton, why a receiver should not be appointed for Manhattan.

15. On the return day, September 6, 1932, a hearing was had before Judge Manton and at that hearing there appeared, among others, Lawrence Berenson, the attorney for Barber; Arthur Berenson, his brother, a Massa-

chusetts lawyer, who appeared personally as a shareholder of Manhattan; Charles Franklin, who stated that he was counsel for a committee called "MANHATTAN COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE" composed of Nathan L. Amster, Morton F. Stern, Hon. Peter Ten Eyck, Edward M. Hamlin, Michael O'Keefe, C. R. Jeffers, Blin W. Page, and Charles Franklin himself, and also on behalf of Brookin Corporation, and Llewellyn Hernly, who had deposited stock with said Committee. There also appeared an attorney, Louis Boehm, who stated that he was counsel for certain stockholders of Manhattan.

16. Said Franklin and Boehm each said that their clients were intervening in the Barber suit. In the course of the hearing before Judge Manton, Mr. Franklin stated that it was the condition of Manhattan that "caused *our bill* to be filed", referring to the Barber bill. At that time there was presented to Judge Manton a petition for intervention in the Barber suit on behalf of Charles Franklin, said Manhattan Railway Company Common Stockholders' Committee and Brookin Corporation, together with a proposed order allowing these parties to intervene in the Barber suit. Copies of the bill of complaint; the order to show cause made by Judge Manton on August 29, 1932, upon a petition made by Lawrence Berenson, verified August 29, 1932; the order of Judge Manton granting leave to Barber to file his bill of complaint, upon a petition made by Lawrence Berenson, verified August 29, 1932; said petition for intervention, and said draft of a proposed order allowing such intervention are attached hereto, marked Exhibit C, and made a part of this affidavit as fully as if set out herein in full.

17. When these lawyers appeared, Judge Manton advised them that, on the intervening petition of Manhattan theretofore filed in the Interborough receivership proceedings, he had already appointed William Roberts, President of Manhattan, as temporary receiver of Manhattan. Thereupon, Mr. Franklin urged Judge Manton

to appoint Nathan L. Amster as an additional receiver of Manhattan. Mr. Boehm asked Judge Manton to appoint as additional receiver Malcolm Sumner. Mr. Arthur Berenson suggested that, as an additional receiver, Judge Manton should name either Mr. Amster or Mr. Sumner. Certain of the remarks of Messrs. Boehm, Franklin, Arthur Berenson and Judge Manton at said hearing were as follows as deponent is informed and believes:

> "Mr. Boehm: I represent 10,000 shares of stock and about $140,000 of bonds, and what we were desirous to accomplish upon this application is the appointment of receivers who would be independent of the Interborough interests.
>
> The Court: You have that, the president of the Manhattan.
>
> Mr. Boehm: Unfortunately, we don't consider him sufficiently independent of the Interborough interests because under his management and under the management of the present board of directors we feel that the interests of the Manhattan have been neglected.
>
> * * * * * * * *
>
> Mr. Franklin: I filed an intervention this morning on behalf of the owners of more than 100,000 shares of Manhattan Railway stock and also some bonds. The so-called Manhattan Railway Company stockholders' committee, of which Mr. Nathan L. Amster has been the chairman for several years. Also the Brookin corporation. I feel, speaking for them, that even in the present situation and even with a temporary receiver, that it would be proper to appoint a co-receiver with Mr. Roberts in order to properly protect certain interests as to which there is a very very strong feeling in the minds of those who are stockholders that there will not be independent action or protection of certain matters that should be taken up promptly. First, there has never been an accounting between the Manhattan and Interborough, although the Manhattan holders have been entitled to such an accounting at Interborough expense. The lease provides for it.
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> * * * * * * * *

1702 The Court: I don't see why we need two receivers at this time. I selected the president of the road because he is familiar with it and therefore, as I see it, at this time the important thing is the collection of rents, distribution, calling the board together, action in the matter of differences, nothing by way of operation, and if the day ever comes when operation becomes necessary by the elevated railway, then I agree with you thoroughly, and then I will appoint the other receiver. The only thing at the present time is whether Mr. Roberts has the stern integrity and sufficient erudition to run this affair.

1703 Mr. Franklin: My suggestion was to name Mr. Amster.

The Court: That has been suggested by Mr. Berenson and I will be very glad to consider it.

* * * * * * * *

Mr. Franklin: I think two would be all that are necessary. We feel at this time that the outside interests so-called, representing very substantial interests—the interests I represent are about $10,000,000 of par of this stock, including bonds—we feel that Mr. Amster who is already a director of the Manhattan Company, and who has been closely allied with it for years, at the last meeting more than half of the Manhattan stock voted for Mr. Amster.

1704 The Court: That is something to have in mind, when another receiver comes along.

Mr. Franklin: We strongly urge that your Honor will consider, to make this receivership entirely above criticism, that it would be right and pleasing I think to all the stockholders and bondholders to have someone acting with Mr. Roberts, if only for the sake of having two receivers instead of one.

* * * * * * * *

Mr. Franklin: What we are interested in and want to join in, and I would like to present one myself, is to have somebody completely independent of the Interborough.

The Court: Here is a large property. Do you think it would be right for me to take out the President and put in somebody——

Mr. Arthur Berenson: We don't ask you to do that. We ask you to appoint a co-receiver.

The Court: I will appoint him any time it is necessary.

Mr. Boehm: I would like to suggest the name of Malcolm Sumner, who is familiar with the stock interests, familiar thoroughly with the situation, and who is also a man of ability.

The Court: When that time comes I will be glad to consider it.

* * * * * * * *

Mr. Arthur Berenson: That is quite right, but I don't object to Mr. Roberts. I would very much like to have your Honor appoint somebody also with Mr. Roberts, and we urge very strongly that your Honor should appoint Mr. Amster. We would be agreeable to Mr. Sumner or any other disinterested person, or somebody whose interests are very much like them, in behalf of the stockholders and bondholders of the Manhattan Railway Company.

I understood from Mr. Amster with whom I had a talk the other day, that the $800,000 of taxes, which were due upon the Manhattan properties and which the Interborough was under obligation to pay, which they had the money to pay and could have paid if they wanted to—when Mr. Amster called attention to that at the board meeting and asked them to take the matter up with the Interborough for the purpose of seeing to it that that $800,000 in taxes was paid, which would have caused a breach of conditions of the Manhattan lease, not only the lease but also the bonds, and would be likely to jeopardize a foreclosure of the property and a wiping out of the interest of the shareholders—he got scant attention from the directors, who did nothing whatsoever about it, and that $800,000 is due now and has been due for some time, overdue, and nothing has been done to press the Interborough towards paying those taxes.

Mr. Roberts: I want to say right there——

Mr. Franklin: May I state——

The Court: I do not see how that is material just now.

Mr. Franklin: It is a thing that alarmed us very much, and caused our bill to be filed.

* * * * * * * *

Mr. Arthur Berenson: We think that the Manhattan, being an entirely different corporation from the other corporation, that it has the right under the circumstances to come in here and ask this Court in a separate proceeding, filed here first, to ask this Court to appoint receivers under that bill. It may be there is a practice which permits the Manhattan in the I. R. T. Receivership to come in and be heard, but that I submit does not
1709 prevent our bill from being filed asking for the appointment of receivers.

The Court: It is and will remain on file of course."

At the conclusion of the hearing, Judge Manton stated that he would deny the application for the appointment of a receiver for Manhattan in the Barber suit.

18. Thereafter, on September 9, 1932, Judge Manton entered a formal order in the Barber suit denying the application for the appointment of a receiver in that suit. Subsequently, by stipulation with Berenson, as attorney for Barber, the time of several of the defendants (in-
1710 cluding the receivers of Interborough and the receiver of Manhattan but excluding the City of New York) to plead or answer the bill in the Barber suit, was continued until October 16, 1932. The Barber bill is still on file, and the time of the defendants for filing answers or other pleadings has not expired. No further proceedings were taken in that suit, except that the City of New York, on September 27, 1932, moved before Judge Mack, holding a District Court for the Southern District of New York, sitting in the Motion Part, that the bill be dismissed for lack of proper service. Judge Mack at once referred this motion to Judge Manton who, on September 27, 1932, entered an order dismissing the Barber suit as to the City of New York.

19. Charles Franklin and Louis Boehm, above referred to, are, respectively, the attorney for the complainant and of counsel for the complainant in the suit of Johnson against Manhattan Railway Company et al., In Equity E 71-153, now pending before this Court. That bill was filed September 21, 1932, or some fifteen days after Mr. Franklin and Boehm had sought unsuccessfully to persuade Judge Manton to appoint a receiver for Manhattan and some twelve days after Judge Manton had entered his formal order in the Barber suit. Charles Franklin verified the bill in that Johnson proceedings and also verified the petition in the Johnson proceedings pursuant to which Judge Caffey entered an *ex parte* order permitting Interborough, and Manhattan and the Receivers of Interborough (appointed by Judge Manton in the *American Brake Shoe* suit), and the Receiver of Manhattan (appointed by Judge Manton in the same suit), to be made parties defendant in the Johnson proceedings; that petition alleged that the order appointing such receivers contained provisions restraining the institution or prosecution of suits against Interborough and Manhattan. The said Charles Franklin also verified the petition pursuant to which Judge Caffey entered the order to show cause in the Johnson proceedings returnable October 4, 1932. Also, on September 21, 1932, Judge Caffey, upon the petition of Lillian Boehm, entered an *ex parte* order allowing her to become a party in the Johnson suit. Lillian Boehm appears by Boehm & Zeigler, solicitors, Louis Boehm of Counsel.

Subsequently, on or about September 24, 1932, the Manhattan Railway Company Common Stockholders' Protective Committee, the Brookin Corporation and Llewellyn Hernly (all of whom, by Charles Franklin, had appeared before Judge Manton in the Barber proceedings on September 6, 1932), filed a petition in the Johnson proceedings, asking leave to intervene therein. In these proceedings Charles Franklin is named as attorney for the petitioners in said petition and Charles Franklin

1714 *Affidavit of J. Osgood Nichols.*

verified the petition, and he is a member of said Manhattan Railway Company Common Stockholders' Protective Committee. Pursuant to this petition, an *ex parte* order was entered on September 26, 1932, allowing the petitioners to intervene in the Johnson proceedings. On October 1, 1932, upon the petition and supplemental bill of Johnson, verified by Charles Franklin (which petition refers to the orders entered by Judge Manton in the American Brake Shoe case continuing the receivership of Interborough and Manhattan), Judge Bondy entered the second *ex parte* order to show cause in this suit re-
1715 turnable October 4, 1932. On October 3, 1932, a substantially similar order to show cause was entered *ex parte* by Judge Woolsey, returnable October 4, 1932, upon a substantially similar petition and bill of the intervenor, Lillian Boehm, appearing by Boehm & Zeigler, Louis Boehm of Counsel.

From a reading of the bill in the Barber proceedings and the bill in the Johnson proceedings, it appears that many of the same allegations are contained in both bills. Both those bills ask for the appointment of a receiver of Manhattan Railway Company.

J. Osgood Nichols.

1716 Sworn to before me this)
5th day of October, 1932.)

(NOTARIAL STAMP AND SEAL)

EXHIBIT A TO AFFIDAVIT OF J. OSGOOD NICHOLS. 17

This exhibit consists of part of the printed record in The American Brake Shoe & Foundry Company against Interborough Rapid Transit Company and is printed at pages 153 to 228 and 231 to 519 of this transcript of record.

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EXHIBIT B TO AFFIDAVIT OF J. OSGOOD NICHOLS.

Doc. 1

Bill of Complaint (Ancillary Suit).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK.

1721

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. 6551

To the Judges of the District Court of the United States for the Eastern District of New York:

1722 The complainant, The American Brake Shoe and Foundry Company, a corporation duly organized and existing under the laws of the State of Delaware, and a citizen of said State, brings this, its bill of complaint, on its behalf and on behalf of all other creditors of the Interborough Rapid Transit Company, the defendant, who may hereafter join in the prosecution of this suit, against the Interborough Rapid Transit Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, and thereupon complainant alleges as follows:

Exhibit B to Affidavit of J. Osgood Nichols. 17

FIRST: The complainant, The American Brake Shoe and Foundry Company is a corporation duly organized and existing under the laws of the State of Delaware, and a citizen and resident of said State.

SECOND: On information and belief, that the defendant was at all times hereafter mentioned, and is now, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, having its principal office in the City of New York.

THIRD: That this is a suit of a civil nature in equity; that the matter in dispute exceeds the sum of $5,000, exclusive of interest and costs, and is between citizens of different States. 172

FOURTH: On the 26th day of August, 1932, a bill of complaint was duly filed in the District Court of the United States for the Southern District of New York by The American Brake Shoe and Foundry Company, as Complainant, against Interborough Rapid Transit Company, as Defendant, which prayed, among other things, that a receiver or receivers be appointed of all and singular the property and assets of any and every nature and wheresoever situated of the said defendant company; and plaintiff respectfully refers to said bill of complaint, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, for a more particular statement of the assets and of the business and purposes thereof, and the capitalization of the defendant company, the allegations of which bill are hereby repeated and adopted as though the same were fully repeated and set forth herein. 1725

FIFTH: On August 26, 1932, upon such bill of complaint and an answer interposed by the defendant company, a copy of which is hereto attached, marked "Exhibit B" and by this reference thereto made a part hereof, Victor J. Dowling and Thomas E. Murray, Jr., were duly appointed as Receivers of the assets, estate and effects of the Interborough Rapid Transit Company, defendant in such cause, by an order, a copy of which is hereto attached, marked

1726 *Exhibit B to Affidavit of J. Osgood Nichols.*

"Exhibit C," and by this reference thereto made a part hereof, duly entered in said cause, and Thomas E. Murray, Jr., has duly filed the bond as directed by said order and has thus duly qualified as Receiver in said cause.

SIXTH: Many miles of the defendant's rapid transit railroad system run through territory which is within the territorial jurisdiction of this Court, and defendant has other property and assets of substantial value within the territorial jurisdiction of this Court.

SEVENTH: Because of the foregoing, it is necessary that an ancillary receiver or receivers be appointed in this district and by this Court in aid of the jurisdiction of the
1727 United States District Court for the Southern District of New York.

WHEREFORE, the plaintiff prays:

1. That the rights of the plaintiff and of all creditors of the defendant may be ascertained and decreed and that the Court will fully administer the fund in which the complainant is interested, constituting the railroad systems and other assets of the defendant situated in the territorial jurisdiction of this Court and will for such purpose marshal and administer all of such assets of the defendant and ascertain the several and respective liens and priorities existing thereon, and enforce by decree the rights, liens and equities of the creditors of the defendant, as the
1728 same may be finally ascertained and decreed by the Court.

2. That pending such marshalling and administration and final decrees, for the purpose of preserving intact such property and assets of the defendant, an ancillary receiver or receivers may be appointed for the defendant and of all the property and assets of the defendant, real, personal and mixed, of whatsoever kind and description, situated in the territorial jurisdiction of this Court, including all railroads, leased or operated, tracks and terminal facilities, rolling stock, franchises, leases, contracts, certificates, rights and properties, with full power to sue for, collect,

receive and take into his possession, goods, chattels, credits, rights, moneys, effects, lands, tenements, books, papers and property and assets of every description of the defendant situated in the territorial jurisdiction of this Court, and with all the incidental powers ordinarily vested in ancillary receivers in like cases and with full power and authority to operate the railroads, property and assets of the defendant situated in the territorial jurisdiction of this Court, and to collect and receive all the rents, issues and profits and income thereof, and to apply the same under the orders or decrees of this Court for such period as the Court shall order, to protect and preserve the corporate franchises, privileges and property and to preserve the corporate existence of the defendant and to protect and preserve the said railroads, property and assets situated in the territorial jurisdiction of this Court from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and to do any and all acts and things which may be necessary to preserve the valuable rights, contracts and franchises of the defendant or otherwise requisite or proper.

3. That temporarily and pending this suit an injunction may issue against the defendant and all persons claiming and acting by, through and under it, and all other persons, to restrain them from interfering with said ancillary receiver or receivers taking possession of said property, and that plaintiff may have such further relief in the premises as the nature of the case may require and as may be agreeable to equity.

4. That at such time as may be found just and proper the assets and properties of the defendant situated in the territorial jurisdiction of this Court, may be ordered to be sold in whole or in part, and in such manner and upon such terms and conditions as this Court shall deem just and equitable, and that any such order of sale shall make proper and suitable provision for the preservation of all equities, rights, priorities, claims and liens of the creditors

1732 *Exhibit A to Affidavit of J. Osgood Nichols.*

of the defendant and shall provide for the sale of such properties and assets of said defendant, subject to or free and clear from any and all liens and encumbrances in whole or in part, in such manner and upon such terms as this Court may direct, and that the proceeds of any such sale be distributed among those entitled thereto, as this Court shall adjudicate, or that such properties of said defendant may be returned to it, and that the complainant may have such other, further and different relief in the premises as to this Court may seem proper and as may be necessary fully to protect and enforce the rights and equities of the complainant and of all the creditors
1733 and stockholders of the defendant.

5. That the defendant be required to answer all and singular the matters above stated but not under oath, answer under oath being hereby expressly waived.

6. That a writ of subpoena may be granted to the complainant to be directed to the defendant thereby requiring said defendant personally to be and appear on a certain day before the Court and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and further to perform and abide by such further order, direction or decree therefor, as to the Court shall seem meet.

1734 7. That plaintiff have such further and other relief as the Court may deem proper and equitable.

Dated, August 26, 1932.

THE AMERICAN BRAKE SHOE & FOUNDRY COMPANY,
by F. H. JANKE,
Assistant Treasurer,
Complainant.

BREED, ABBOTT & MORGAN,
Solicitors for Plaintiff,
MATHIAS PLUM, JR.,
Of Counsel.

Exhibit B to Affidavit of J. Osgood Nichols.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

FRANK H. JANKE, being duly sworn, deposes and says: that he is the Assistant Treasurer of The American Brake Shoe and Foundry Company, the complainant named in the foregoing bill of complaint; that he makes this affidavit for and in its behalf and is duly authorized to do so; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true; that the sources of deponent's knowledge and the grounds of his belief as to all matters not stated upon plaintiff's own knowledge are as follows: deponent has made inquiries concerning the present condition of the defendant Interborough Rapid Transit Company, and from such inquiries has obtained the information concerning the facts alleged in said bill of complaint upon information and belief.

FRANK H. JANKE.

Subscribed and sworn to before me
this 26 day of August, 1932.

WILLIAM C. BREED, JR.,
Notary Public,
New York County.
N. Y. Co. Clks. No. 436, Reg. No. 43650.
Commission expires March 30, 1934.

1738 *Exhibit B to Affidavit of J. Osgood Nichols.*

Exhibits Annexed to Bill of Complaint (Ancillary Suit).

Exhibits A, B and C to the Bill of Complaint were the Bill of Complaint, Answer and the Order of Judge Manton appointing Temporary Receivers in the American Brake Shoe Case in the Southern District of New York, which documents by consent of the parties are printed at pages 153-176, inclusive, and 180-184, inclusive, respectively, of this Transcript of Record.

1739

1740

Exhibit B to Affidavit of J. Osgood Nichols.

Doc. 2.

Answer (Ancillary Suit).

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. 6551

Interborough Rapid Transit Company, the defendant in this cause, for answer to the bill of complaint herein, or unto so much and such parts thereof as the defendant is advised it is necessary or material for this defendant to make answer, answering, says:

FIRST: The defendant admits all the allegations of said bill of complaint.

SECOND: The defendant, reiterating the admissions of the preceding paragraph "First" of this answer, joins in the prayer of said bill of complaint and prays that this Court, sitting in equity, may take possession of the railroad system of the defendant and of all the property and assets of the defendant situated in the territorial jurisdiction of this Court through the appointment of an ancillary Receiver or Receivers as prayed in said bill of complaint and thereby protect and preserve the corporate

1744 *Exhibit B to Affidavit of J. Osgood Nichols.*

franchises, privileges, property and assets and preserve the corporate existence of the defendant and protect and preserve its said system and its said property, real and personal, from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and do any and all acts which may be necessary to preserve the valuable rights, contracts, franchises, property and assets of the defendant situated in the territorial jurisdiction of this Court; and the defendant accordingly prays that, inasmuch as there is no adequate remedy at law in the premises for the plaintiff or for this defendant, this Court will, for the purposes aforesaid, appoint an
1745 ancillary Receiver or Receivers as prayed for in said complaint, and empower and authorize such ancillary Receiver or Receivers to take possession of the entire property and assets of this defendant situated in the territorial jurisdiction of this Court, and to preserve, manage, operate and control the same, and otherwise discharge all the duties ordinarily imposed by courts upon ancillary Receivers in similar cases; and that this Court will direct all persons in possession of said property and assets of this defendant, or any part thereof, to surrender the same to such ancillary Receiver or Receivers or to hold such property and assets as such ancillary Receiver or Receivers may direct.

JAMES L. QUACKENBUSH,
1746 Solicitor for Interborough Rapid
Transit Company, Defendant,
Office and P. O. Address,
165 Broadway,
Borough of Manhattan,
City of New York, N. Y.

Exhibit B to Affidavit of J. Osgood Nichols.

Doc. 3.

Order Appointing Receivers (Ancillary Suit).

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. 6551

This cause came on to be heard at this term upon the bill of complaint, the exhibits thereto attached and on the answer of the defendant thereto this day filed, and thereupon upon consideration thereof, and after due deliberation, the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED, that Victor J. Dowling, of the City of New York, and Thomas E. Murray, Jr., of the City of New York, be and they hereby are appointed temporary ancillary Receivers of the defendant, Interborough Rapid Transit Company, and of all the property and assets of the said defendant, real, personal and mixed, of whatsoever kind and description, situated in the territorial jurisdiction of this Court, including all railroads, owned, leased or operated by said defendant, all tracks, terminal facilities, offices, shops and all buildings and appurtenances of every kind, all cars and other rolling

stock and equipment, tools, machinery, furniture, fixtures, materials and supplies, books of account, records and other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, evidences of indebtedness, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income accruing and to accrue as well as all interest, easements, privileges and franchises and all assets of every kind, character and description of the defendant herein situated in the territorial jurisdiction of this Court; that the said ancillary Receivers be and they hereby are authorized immediately to take possession of the same and to run, manage and operate the said railroads, properties and assets in such manner as will in their judgment produce most satisfactory results so that the operation of the railroad system of the defendant shall be continued in the same manner as at present and the public duties obligatory upon the defendant be in all respects discharged, and to exercise the authority and franchises of defendant and discharge its public duties and to preserve and protect its said system, properties and assets in proper condition and repair and to protect the title and possession and secure and develop the business of the same, and in their discretion to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing; that the said ancillary Receivers be and they hereby are authorized to collect and receive the rents, income, tolls and profits of the said railroads, properties and assets, and to make appropriate payments therefrom on account of accruing rents and other necessary charges, and they shall have power to redeem any and all securities of the defendant now pledged as security on loans of money, and shall have power to borrow money if needful in their judgment in order to comply with this direction, and also, so far as may be needful, to meet current re-

quirements for labor, materials and supplies, but for no other purpose without the further order of this Court; and the said ancillary Receivers are hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in their judgment for the proper protection of the property and trust hereby reposed in them and likewise to defend all actions instituted against them as ancillary Receivers, and also to appear in and conduct the prosecution or defense of any suits now pending in any court against the defendant, the prosecution and defense of which will in the judgment of said ancillary Receivers be necessary for the proper protection of the property placed in their charge, or the interests and rights of creditors connected therewith; and the said ancillary Receivers are hereby authorized in their discretion from time to time, out of the funds coming into their hands, to pay the expenses of operating the said properties and executing their trusts, and all taxes and assessments upon the said properties or any part thereof, and all such rentals and instalments as may fall or become due for the use of any portion of said railroads and other property; and also to pay and discharge all claims arising from the previous operation of said properties as in their judgment on examination are proper to be paid as expenses of operation, and also to pay the current and unpaid payrolls (especially any and all outstanding checks, drafts or orders for the payment of wages or salaries of employees of defendant for work done or services rendered prior to the date of this order), and vouchers and supply accounts incurred in the operation of said railroads system at any time within four months prior hereto. The said ancillary Receivers are hereby required to open proper books of account, wherein shall be stated the earnings, expenses, receipts and disbursements of their said trust, and preserve proper vouchers for all payments by them made on account thereof;

1756 *Exhibit B to Affidavit of J. Osgood Nichols.*

And it is further ordered that the bonds of the said ancillary Receivers in the sum of Fifty thousand 00/100 Dollars each, conditioned that they will well and truly perform the duties of their office and duly account for all moneys or property which may come into their hands, and abide by and perform all things which they shall be directed to do, with sufficient sureties to be approved of by a judge of this Court, be filed in the office of the Clerk of this Court;

And it is further ordered that the defendant, said Interborough Rapid Transit Company, and each and every of its officers, directors, agents and employees and all other
1757 persons whomsoever, be and they are hereby required and commanded forthwith, upon demand of the said ancillary Receivers, or their duly authorized agent, to turn over and deliver to said ancillary Receivers, or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his or their hands or under his or their control situated in the territorial jurisdiction of this Court, and each of said directors, officers, agents and employees is hereby commanded and required to obey and perform such orders as may be given to them from time to time by the said ancillary Receivers, or their duly constituted representatives, in conducting the operation of the said system, properties and assets, and in dis-
1758 charging their duties as ancillary Receivers;

And the defendant, said Interborough Rapid Transit Company, and its officers, directors, agents and employees, and all other persons claiming to act by, through or under the defendant and all other persons whomsoever are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the ancillary Receivers are hereby appointed or interfering in any way to prevent the discharge of their

duties or their operation of the same, and any party in interest may apply for further direction;

And it is further ordered that any applications or petitions for orders or instructions or otherwise in this cause shall be made to the undersigned in chambers or otherwise, the undersigned hereby reserving full right and jurisdiction over this cause and any and all proceedings therein;

And it is further ordered that if either of said ancillary Receivers shall qualify by giving his bond before the other of such ancillary Receivers has so qualified, the said ancillary Receiver so first qualifying shall, until the other of such ancillary Receivers has so qualified, exercise any or all the powers, by this order or subsequent orders entered herein, conferred upon said ancillary Receivers;

And it is further ordered that if at any time either of said ancillary Receivers shall, because of absence from the United States or otherwise, be unable to act, the other of such ancillary Receivers may in such event exercise any or all the powers, by this order or subsequent orders entered herein, conferred upon said ancillary Receivers;

And it is further ordered that if and when the Temporary receivership in the aforesaid proceedings in the United States District Court for the Southern District of New York is made permanent by said Court, pursuant to the order of the said Court appointing temporary Receivers, a copy of which is attached to the bill of complaint filed herein, then the receivership herein shall be made permanent.

Dated, New York, August 26, 1932.

MARCUS B. CAMPBELL,
United States District Judge.

1762 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 4
Order 2

Order Appointing Receivers' Counsel (Ancillary Suit).

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant,	ORDER
against	In Equity No. 6551
INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	

1763

This cause coming on to be heard upon the petition of Thomas E. Murray, Jr., one of the ancillary Receivers herein, acting for and on behalf of both ancillary Receivers appointed herein, for leave to employ solicitors and general counsel for said ancillary Receivers, and upon the annexed affidavit of Henry J. Wolff, and it appearing to the Court from such petition that numerous and intri-
1764 cate legal questions will be presented in the administration of said ancillary receivership, and that it is necessary for said ancillary Receivers to employ solicitors and general counsel to aid them in said administration, and it appearing from such petition and the affidavit of Henry J. Wolff that Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, 25 Broadway, Borough of Manhattan, City of New York, are competent to act as solicitors and general counsel for said ancillary Receivers, and for the special reasons

set forth in such petition and affidavit are not disqualified, because of any adverse interest or otherwise, it is therefore

ORDERED that leave be, and it is hereby, granted to said Receivers to retain said Chadbourne, Stanchfield & Levy as solicitors and general counsel for the ancillary Receivers in the above entitled cause; and it is further

ORDERED that said Chadbourne, Stanchfield & Levy be, and they are hereby, appointed the solicitors and general counsel for said ancillary Receivers.

Dated, Brooklyn, N. Y., August 29th, 1932.

MARCUS B. CAMPBELL,
U. S. D. J.

Doc. 5.

Receivers' Application No. 1 (Ancillary Suit).

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. 6551 RECEIVERS' PETITION

The petition of Thomas E. Murray, Jr., ancillary Receiver herein, acting on behalf of and for both ancillary

1768 *Exhibit B to Affidavit of J. Osgood Nichols.*

Receivers, duly appointed by an order of this Court, dated August 26, 1932, upon information and belief, respectfully shows to this Court as follows:

1. On August 26, 1932, by an order of this Court, your petitioner and Victor J. Dowling were duly appointed ancillary Receivers herein, and your petitioner has duly executed and filed the bond required by the terms of said order, and is now acting as such ancillary Receiver.

2. Your petitioner realizes that the duties of the ancillary Receivers are complicated, and that there are many intricate legal questions which will arise in the conduct
1769 of such duties, and it is therefore imperative that your ancillary Receivers be allowed to employ solicitors and general counsel to represent them and advise them in their discharge of such duties, in order that they may properly administer their trust.

3. Your petitioner deems the firm of Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, at No. 25 Broadway, Borough of Manhattan, City of New York, to be competent and qualified to represent them as their solicitors and general counsel in the administration of said trust for the following reasons:

Several members of the firm of Chadbourne, Stanchfield
1770 & Levy have had previous contact with the legal problems pertaining to traction matters both in New York City and Chicago, Illinois.

Furthermore, said firm has an extensive practice in equity receivership matters.

4. Attached hereto, marked "Exhibit 1," are copies of the petition and affidavits filed in the receivership proceedings pending in the United States District Court for the Southern District of New York and referred to in the

bill of complaint filed hereon on August 26, 1932, asking for leave to the Receivers appointed in said proceedings to employ as their solicitors and general counsel the firm of Chadbourne, Stanchfield & Levy, and attached hereto, marked "Exhibit 2," is a copy of the order of the United States District Court for the Southern District of New York entered pursuant to said petition and granting leave to said Receivers to employ the firm of Chadbourne, Stanchfield & Levy as their solicitors and general counsel in said proceedings pending in the United States District Court for the Southern District of New York.

WHEREFORE, your petitioner prays that an order be entered herein granting leave to your ancillary Receivers to employ said firm of Chadbourne, Stanchfield & Levy to be solicitors and general counsel for them as such ancillary Receivers in this cause.

Dated, August 27th, 1932.

THOMAS E. MURRAY, JR.,
Receiver, acting on behalf of and for
both the Receivers.

1774 *Exhibit B to Affidavit of J. Osgood Nichols.*

Exhibit I to Doc. 5 (Ancillary Suit).

RECEIVER'S APPLICATION No. 1.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364 RECEIVERS' PETITION.

1775

The petition of THOMAS E. MURRAY, JR., Receiver herein, acting on behalf of and for both Receivers, duly appointed by an order of this Court, dated August 26, 1932, upon information and belief, respectfully shows to this Court as follows:

1. On August 26, 1932, by an order of this Court, your petitioner and Victor J. Dowling were duly appointed Receivers herein, and your petitioner has duly executed and filed the bond required by the terms of said order, and is now acting as such Receiver.

1776

2. Your petitioner realizes that the duties of the Receivers are complicated, and that there are many intricate legal questions which will arise in the conduct of such duties, and it is therefore imperative that your Receivers be allowed to employ solicitors and general counsel to represent them and advise them in their discharge of such

duties, in order that they may properly administer their trust.

3. Your petitioner deems the firm of Chadbourne, Stanchfield & Levy, practicing attorneys and members of the bar of the State of New York, at No. 25 Broadway, Borough of Manhattan, City of New York, to be competent and qualified to represent them as their solicitors and general counsel in the administration of said trust for the following reasons:

Several members of the firm of Chadbourne, Stanchfield & Levy have had previous contact with the legal problems pertaining to traction matters both in New York City and Chicago, Illinois.

Furthermore, said firm has an extensive practice of equity receivership matters.

4. Your petitioner has been requested by the firm of Root, Clark & Buckner, counsel for the Committee for the Ten-Year Six Per Cent Gold Notes of Interborough Rapid Transit Company, to retain said firm of Chadbourne, Stanchfield & Levy as the solicitors and general counsel for the Receivers in this cause, and your petitioner is of the belief that, because of the reasons above set forth, it is advisable to accept such suggestion.

WHEREFORE, your petitioner prays that an order be entered herein granting leave to your Receivers to employ said firm of Chadbourne, Stanchfield & Levy to be solicitors and general counsel for them as such Receivers in this cause.

Dated, New York, N. Y., August 26, 1932.

THOMAS E. MURRAY, JR.,
Receiver, Acting on behalf of and
for Both the Receivers.

1780 *Exhibit B to Affidavit of J. Osgood Nichols.*

Exhibit 2 to Doc. 5. (Ancillary Suit).

ORDER APPOINTING RECEIVERS' COUNSEL.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364 ORDER

1781

This cause coming on to be heard upon the petition of THOMAS E. MURRAY, JR., Receiver herein, acting for and on behalf of both Receivers appointed herein, for leave to employ solicitors and general counsel for said Receivers, and upon the annexed affidavit of Thomas L. Chadbourne, and it appearing to the Court from such petition that numerous and intricate legal questions will be presented in the administration of said receivership, and that it is necessary for said Receivers to employ solicitors and general counsel to aid them in said administration, and it appearing from such petition and the affidavit of Thomas L. Chadbourne that Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, 25 Broadway, Borough of Manhattan, City of New York, are competent to act as solicitors and general counsel for said Receivers and for the special reasons set forth in such petition and affidavit are not disqualified, because of any adverse interest, it is therefore

1782

Exhibit B to Affidavit of J. Osgood Nichols. 17

ORDERED that leave be, and it is hereby, granted to said Receivers to retain said Chadbourne, Stanchfield & Levy as solicitors and general counsel for the Receivers in the above-entitled cause; and it is further

ORDERED that said Chadbourne, Stanchfield & Levy be, and they are hereby, appointed the solicitors and general counsel for said Receivers.

Dated, New York, N. Y., August 26, 1932.

MARTIN T. MANTON,
U. S. Circuit Judge designated to hold a term of the District Court for Southern District of New York. 178

Doc. 5

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	AFFIDAVIT	1785

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

THOMAS L. CHADBOURNE, being duly sworn, deposes and says:

1786 *Exhibit B to Affidavit of J. Osgood Nichols.*

1. That he is one of the partners of the firm of Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, of 25 Broadway, Borough of Manhattan, City of New York.

2. That several members of the firm of Chadbourne, Stanchfield & Levy have had contact in the intricate and numerous legal problems in connection with traction matters, both in the City of New York and in the City of Chicago, Illinois. Furthermore, the firm of Chadbourne, Stanchfield & Levy has an extensive practice in connection with equity receivership causes.

1787 3. That such firm was appointed counsel for the Committee for the Ten-Year Six Per Cent. Gold Notes of Interborough Rapid Transit Company on or about July 18, 1932, but such firm has, prior to the institution of this cause, resigned as counsel for such Committee. Such firm has acted on some occasions as attorneys for the firm of Hayden, Stone & Co. and for some members of Hayden, Stone & Co. Your deponent believes that the firm of Hayden, Stone & Co. and possibly some members of such firm may be interested in securities of Interborough Rapid Transit Company. However, the firm of Chadbourne, Stanchfield & Levy does not and will not represent any creditor of Interborough Rapid Transit Company or any other person interested in the above cause or in the re-
1788 ceivership estate.

4. Such firm of Chadbourne, Stanchfield & Levy has not at any time been counsel for Interborough Rapid Transit Company. Said firm neither have nor represent nor does any member or associate of said firm have or represent any interest adverse to Interborough Rapid Transit Company or the Receivers of Interborough Rapid

Exhibit B to Affidavit of J. Osgood Nichols.

Transit Company appointed by order of this Court entered August 26, 1932.

THOMAS L. CHADBOURNE.

Sworn to before me this
26 day of August, 1932.

ARTHUR E. PEACOCK,
Notary Public,
Queens County.
Certificate filed in New York County No. 300.

1792 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 5

Affidavit of Receivers' Counsel (Ancillary Suit).

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
1793 Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

AFFIDAVIT

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HENRY J. WOLFF, being duly sworn, deposes and says:

1. That he is one of the partners of the firm of Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, of 25 Broadway,
1794 Borough of Manhattan, City of New York.

2. That several members of the firm of Chadbourne, Stanchfield & Levy have had contact with the intricate and numerous legal problems in connection with traction matters, both in the City of New York and in the City of Chicago, Illinois. Furthermore, the firm of Chadbourne, Stanchfield & Levy has an extensive practice in connection with equity receivership causes.

Exhibit B to Affidavit of J. Osgood Nichols. 17

3. That such firm was appointed counsel for the Committee for the Ten-Year Six Per Cent. Gold Notes of Interborough Rapid Transit Company on or about July 18, 1932, but such firm has, prior to the institution of this cause, resigned as counsel for such Committee. Such firm has acted on some occasions as attorneys for the firm of Hayden, Stone & Co. and for some members of Hayden, Stone & Co. Your deponent believes that the firm of Hayden, Stone & Co. and possibly some members of such firm may be interested in securities of Interborough Rapid Transit Company. However, the firm of Chadbourne, Stanchfield & Levy does not now and will not represent any creditor of Interborough Rapid Transit Company or any other person interested in the above cause or in the receivership estate. 179

4. Such firm of Chadbourne, Stanchfield & Levy has not at any time been counsel for Interborough Rapid Transit Company. Said firm neither have nor represent, nor does any member or associate of said firm have or represent any interest adverse to Interborough Rapid Transit Company or the Ancillary Receivers of Interborough Rapid Transit Company appointed by order of this Court entered August 26, 1932.

HENRY J. WOLFF.

Sworn to before me this
26th day of August, 1932. 1797

JACOB S. FUCHS,
Notary Public,
(Seal) Bronx Co. #61F33.
Cert. filed in N. Y. Co.
Comm. expires March 30, 1933.

1798 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 6

Consent and Waiver of Notice as to Appointment of Receivers' Counsel (Ancillary Suit).

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

1799

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

WAIVER OF CONSENT AND NOTICE

We hereby waive notice of the within petition and consent to the granting and entering of the attached order authorizing the Receivers herein to employ as their solicitors and general counsel herein the firm of Chadbourne, Stanchfield & Levy.

1800 Dated, New York, N. Y., August 27th, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.

Exhibit B to Affidavit of J. Osgood Nichols. 180

Doc. 7
Order 3

Petition and Order Authorizing Ancillary Receivers to Number Documents and Papers.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. 6551 ORDER

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., the ancillary Receivers herein, and upon the consent thereto of the attorneys for the complainant and the attorney for the defendant, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED that the ancillary Receivers be and they hereby are authorized and permitted to cause all of the documents and papers to be filed in the proceedings in this cause to be numbered, and that any parties in these proceedings may refer by such number to any of such documents and papers in any subsequent proceedings in this cause.

Dated, Brooklyn, N. Y., September 21st, 1932.

MARCUS B. CAMPBELL,
U. S. District Judge.

1804 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 7

Ancillary Receivers' Application No. 2.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,

1805

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity No. 6551

RECEIVERS' PETITION

To the Honorable Judges of the District Court of the United States for the Eastern District of New York:

The petition of Victor J. Dowling and Thomas E. Murray, Jr., ancillary Receivers herein, upon information and belief respectfully shows to this Court as follows:

1. That in the administration of this estate numerous
1806 proceedings will be necessary, involving the filing of many papers and documents.

2. That in order that your ancillary Receivers may be able to maintain an orderly and careful record of all proceedings in this cause and of all documents and papers to be filed in connection with the administration of the estate, your petitioners desire to number the various ancillary Receivers' petitions and orders which may be entered by this Court and any other documents or papers which may

be filed herein, and to refer in any subsequent papers or documents to such previous papers by the numbers contained on such documents and papers.

WHEREFORE, your petitioners pray that an order be made by this Court authorizing and permitting the ancillary Receivers to number the various documents and papers filed in this cause, and that any parties in these proceedings may refer to such documents and papers by the numbers contained thereon.

Dated, Brooklyn, N. Y., September 8, 1932.

VICTOR J. DOWLING, 180
THOMAS E. MURRAY, JR.,
Ancillary Receivers.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Ancillary Receivers,
Office and P. O. Address,
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE,
of Counsel.

1810 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 7

Waiver and Consent.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant,	In Equity No. 6551
1811 against	WAIVER OF NOTICE AND CONSENT
INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

1812

JAMES L. QUACKENBUSH,
Attorney for Defendant.

Exhibit B to Affidavit of J. Osgood Nichols. 18

Doc. 8
Order 4

Petition and Order Authorizing Ancillary Receivers to Maintain a Printed Record of All Documents.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity No. 6551 181

ORDER

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., ancillary Receivers herein, and upon the consent thereto of the attorneys for the complainant and the attorney for the defendant, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, and it appearing to the Court that the entry of this order will facilitate and further the orderly and careful administration of the estate, it is therefore 1815

ORDERED, ADJUDGED AND DECREED that leave be and it is hereby granted to said ancillary Receivers to maintain a printed record of all documents arising in the proceedings in this cause and of any further documents and papers which in the discretion of the ancillary Receivers should be so printed.

Dated, Brooklyn, N. Y., September 21st, 1932.

MARCUS B. CAMPBELL,
U. S. District Judge.

1816 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 8

Ancillary Receivers' Application No. 3.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. 6551 RECEIVERS' PETITION

1817

To the Honorable Judges of the District Court of the United States for the Eastern District of New York:

The petition of Victor J. Dowling and Thomas E. Murray, Jr., ancillary Receivers herein, upon information and belief respectfully shows to this Court as follows:

1. That in the administration of this estate numerous proceedings will be necessary, involving records of considerable length and detail.

1818

2. That in order that your ancillary Receivers may be able to maintain an orderly and careful record of all proceedings in this cause and of all documents and papers arising in the administration of the estate, your petitioners desire to cause to be printed all such records filed in said proceedings and any further documents and papers which your ancillary Receivers in their discretion desire to have so printed.

WHEREFORE, your petitioners pray that an order be made by this Court authorizing the ancillary Receivers to main-

tain a printed record of all documents arising in the proceedings in this cause and of any further documents and papers which your ancillary Receivers in their discretion desire to have so printed.

Dated, Brooklyn, N. Y., September 8, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Ancillary Receivers.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Ancillary Receivers,
Office and P. O. Address,
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE,
of Counsel.

1822 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 8

Waiver and Consent.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant,	In Equity No. 6551
1823 against	
INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	WAIVER OF NOTICE AND CONSENT

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
1824 Attorney for Defendant.

Exhibit B to Affidavit of J. Osgood Nichols. 18

Doc. 9
Order 5

Petition and Order Authorizing Ancillary Receivers to Pay Expenses for Registration and Transfer of Stock of Interborough Rapid Transit Company.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

182

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. 6551 ORDER

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., ancillary Receivers herein, and upon the consent thereto of the attorneys for the complainant and the attorney for the defendant, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, and it appearing to the Court that the entry of this order will facilitate and further the orderly and careful administration of the estate, it is therefore 1827

ORDERED, ADJUDGED AND DECREED that, until the Court shall otherwise direct, the ancillary Receivers be and they hereby are authorized to pay, out of funds coming into their hands as ancillary Receivers, such expenses as they

1828 *Exhibit B to Affidavit of J. Osgood Nichols.*

shall deem necessary or proper for the registration and transfer of the outstanding shares of stock of Interborough Rapid Transit Company.

Dated, Brooklyn, N. Y., September 21st, 1932.

MARCUS B. CAMPBELL,
U. S. District Judge.

Doc. 9

Ancillary Receivers' Application No. 4.

1829

September 8, 1932.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against	In Equity No. 6551
1830 INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	RECEIVERS' PETITION

To the Honorable Judges of the District Court of the United States for the Eastern District of New York:

The petition of Victor J. Dowling and Thomas E. Murray, Jr., ancillary Receivers herein, upon information and belief respectfully shows to this Court as follows:

Exhibit B to Affidavit of J. Osgood Nichols.

1. That the appointment of your petitioners as ancillary Receivers of the defendant company has necessarily left it without any cash resources with which to pay the ordinary and necessary current expenses for the registration and transfer of its outstanding shares of stock.

2. That your petitioners are of the opinion that it is desirable that the ancillary Receivers herein be authorized to pay, out of funds coming into their hands as ancillary Receivers, such expenses.

WHEREFORE, your petitioners pray for an order authorizing the ancillary Receivers to pay, out of funds coming into their hands as ancillary Receivers, all expenses necessary or proper to provide for the registration and transfer of the outstanding shares of stock of Interborough Rapid Transit Company.

Dated, Brooklyn, N. Y., September 8, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY,
Ancillary Receivers.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Ancillary Receivers,
Office and P. O. Address,
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE,
of Counsel.

1834 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 9

Waiver and Consent.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity No. 6551 WAIVER OF NOTICE AND CONSENT

1835

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

1836

JAMES L. QUACKENBUSH,
Attorney for Defendant.

183

Exhibit C Annexed to Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HARRY BARBER,
Complainant,
against

MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as RECEIVERS OF THE INTERBOROUGH RAPID TRANSIT COMPANY, and THE CITY OF NEW YORK,
Defendants.

1838

The complainant brings this his bill of complaint against the above-named defendants and respectfully alleges the following:

I. The complainant is a citizen and resident of Boston, in the Commonwealth of Massachusetts, and is 1839
the record holder of twenty (20) shares of the capital stock of the defendant MANHATTAN RAILWAY COMPANY (hereinafter called "Manhattan") having a par value of $2,000. One Arthur Berenson, the holder of 230 shares of the 7% stock of Manhattan of the par value of $23,000 and the holder of $10,000 face value of second mortgage bonds of Manhattan is associated with the plaintiff in this suit, but being a resident of New York cannot become a party plaintiff without destroying the jurisdiction of this court.

The defendants, Manhattan and INTERBOROUGH RAPID TRANSIT COMPANY (hereinafter called "Interborough"),

are street railway corporations, duly organized under the laws of the State of New York, and are citizens of the State of New York. The aforesaid Dowling and Murray are citizens and residents of the State of New York, and were duly appointed temporary receivers of the defendant Interborough by order of this court on August 26, 1932. Application is hereby made to this Honorable Court to join the said Dowling and Murray as Receivers of Interborough as parties defendant in the above entitled cause and for leave to sue Interborough.

II. This action is brought by the complainant in his derivative capacity as a minority stockholder of Manhattan, in his own behalf and in behalf of such other stockholders of Manhattan as may join herein and become parties hereto (by leave of court) for the benefit of Manhattan.

III. The bill of complaint herein brought by the complainant as a stockholder of Manhattan is founded upon rights which may properly be asserted by Manhattan. The complainant was a shareholder of Manhattan at the time of the transactions complained of herein. This suit is not a collusive one to confer on a court of the United States the jurisdiction of a cause of which it would not otherwise have cognizance, and is instituted in good faith for Manhattan's benefit.

IV. Upon information and belief Manhattan was incorporated in the State of New York, November 1, 1875. It owns all of the elevated railroads in the Borough of Manhattan and The Bronx, New York City. The length of its main line and branches is approximately forty-two (42) miles with a track mileage aggregating one hundred and thirty-nine (139) miles.

On January 1, 1903, Manhattan leased its entire properties to Interborough for a period of nine hundred and ninety-nine (999) years, under a written lease, providing among other things as follows:

"Article Sixth.—The Lessee hereby leases and hires from the Lessor the said railroad and railroads, franchises, rights, privileges, easements, real estate and property, hereinbefore mentioned, described and demised, for and during said term of nine hundred and ninety-nine (999) years aforesaid, and upon the terms and conditions in this lease expressed, and the Lessee hereby covenants and agrees to pay to the Lessor and hereby guarantees to each owner of record of shares of capital stock of the Lessor, dividends, as rent, as hereinafter provided, for the term of two years and nine months from the 31st day of March, 1903. The Lessor hereby covenants and agrees that prior to the date of payment of each of the installments of rent provided for in this article, it will declare a dividend equal to such installment, payable upon the date of payment of such installment, and after or simultaneously, with such declaration of dividend, will close the transfer books of stock for a reasonable time prior to such date of payment, and that such dividend shall be payable to the owner of record of its stock, who shall be such, on the day of closing of its transfer books aforesaid. The said dividend rentals payable to all such owners of record for each of the first two years and the remaining nine months comprised in said two years and nine months shall be an amount equal in the aggregate to the net earnings of the Lessor, for each of said three periods respectively, but shall not exceed seven per centum (7%) per annum upon the outstanding capital stock of the Lessor; and shall be not less than six per centum (6%) per annum upon such stock; said net earnings shall among other things, include all interest earned by the Lessor, and shall be ascertained by the system of accounting heretofore employed by the Lessor, and by deducting from the gross earnings, among other things, operating expenses, taxes accrued and proportionately chargeable to the period aforesaid, interest upon the bonds described or mentioned in ARTICLE SEVENTH of this lease; repairs, replacements, expenses of litigation and all judgments recovered, except judgments recovered by owners or parties otherwise interested in property abutting upon the lines of rail- 1844 1845

road of the Lessor, for damages to said abutting property, or the rental value thereof, arising from the construction, maintenance and or operation of the said railroads, and their interference with easements of light, air and access, and the expenses of the Lessor in litigations connected therewith.

Proper books of account according to the system of accounting heretofore employed by the Lessor shall be kept by the Lessee until January first, 1906, showing the gross earnings, and an itemized account of the proper and reasonable charges against the same which shall at all times be open to the inspection of the officers and agents of the Lessor.

1847 No reduction of the guaranteed annual dividend rental or in the term of years of this lease shall be made without the unanimous consent of the shareholders of record of the Lessor, provided, however, that nothing herein contained shall otherwise limit the lawful powers of the Board of Directors and shareholders of the Lessor to deal with the subject-matter of this lease and its provisions.

From and after the expiration of said two years and nine months, and from January first, 1906, the Lessee hereby covenants and agrees to pay to the Lessor, and guarantees to each owner of record of the shares of capital stock of the Lessor, as rent, an annual dividend of seven per centum (7%) on his holding of the capital stock of the Lessor.

1848 The Lessee hereby covenants and agrees, that it will each and every year during the term hereby granted, beginning with the first day of April, 1903, pay to the Lessor as rent for the demised property, and hereby guarantees to the respective owners of record of the shares of the Lessor, the said annual dividends free of all charges, in quarter-yearly payments on the first days of January, April, July and October in each year, which after January 1st, 1906, shall be equal quarterly payments; the first of such payments to be made on the first day of July, 1903; and the Lessee will from time to time execute in proper form a guarantee to the above effect, printed or engraved upon the certificates of stock of the Lessor; and as such stock certificates are surrendered for cancellation and issuance of new certificates in place thereof, will from time to time, upon

request of the holder renew such guarantee upon all such new certificates.

The form of such Guarantee shall be as follows:

"Dividends amounting to six per cent per annum and an additional amount, if earned, not exceeding one per cent. per annum, until January first, 1906, and after that date, dividends amounting to seven (7) per cent. per annum, upon the par value of the outstanding capital stock of the Manhattan Railway Company are guaranteed, and will be paid by the undersigned, in accordance with the terms and provisions of a certain Indenture made between the Manhattan Railway Company 1850
and the undersigned, dated the first day of January, 1903.

INTERBOROUGH RAPID TRANSIT COMPANY;
By

Treasurer."

Payment of dividends as above provided by the Lessee to the stockholders of the Lessor shall constitute payment of rent, in compliance with the foregoing covenants to pay the same to the Lessor.

Article Seventh.—The Lessee hereby assumes and covenants and agrees to pay to the Lessor as rent, as the same respectively becomes due, the interest on the outstanding Debenture Bonds of the 1851
New York Elevated Railroad Company, now merged in and with the Lessor, of which One million dollars ($1,000,000) of principal are now outstanding, and also the interest on the First Mortgage Bonds of the Metropolitan Elevated Railway Company, now merged in and with the Lessor, of which there are outstanding of principal Ten million eight hundred and eighteen thousand dollars ($10,818,000), and also the interest on the Consolidated Mortgage Four Per cent. Bonds of the Lessor, of which there are now outstanding of principal twenty-eight millions and sixty-five thousand dollars ($28,065,000); and also the interest on all bonds that may hereafter be issued by the Lessor in extension of or substitution of or for the purpose of retiring any of the aforesaid or renewal Mortgage Bonds; and also the in-

terest on all the bonds of the Lessor which may hereafter be issued, in pursuance of the terms of the Consolidated Mortgage of the Lessor; and also the interest on all bonds of the Lessor which may hereafter be issued either as an original issue or as extension or renewal bonds, as provided by the terms of this lease; and the Lessee further covenants and agrees to keep the Lessor safe and harmless at all times from all claims and demands against it for interest arising from or under the said bonds, or any of them.

Payment of any of such interest by the Lessee to the bondholders of the Lessor shall constitute pay-
1853 ment of rent, in compliance with the foregoing covenants to pay the same to the Lessor.

The Lessee hereby further covenants and agrees to keep and perform all the conditions, covenants and agreements that may be contained in all or any of the aforesaid mortgages to be kept and performed by the Lessor, except the agreement to pay the principal of the bonds respectively secured thereby.

For all of the payments in this lease provided on the part of the Lessee, well and truly to be made during the term of this lease demised, the said Lessee hereby binds itself and its successor or successors firmly by these presents.

Article Eighth.—The railroads hereby leased
1854 shall be deemed to have been operated from twelve o'clock and one second on the morning of the first day of April in the year One thousand nine hundred and three, by the Lessee, and all such operation from and after that time shall be for the account of the said Lessee; provided, however, to the end that the present plans of improvement and financial administration of the leased property may be completed, the present Vice-President, Treasurer and Auditor of the Lessor shall be appointed as the Executive Officer, Treasurer and Auditor, respectively, of the Lessee with respect to the leased property, until January first, 1906, and in the event of the inability of any of such officers to act, by resignation or otherwise, his successor shall be selected by the Lessee, with the approval of the Lessor.

Article Ninth.—The Lessee covenants and agrees at its own proper cost and expense to maintain, operate and run the demised railroads and property during the said term in the same manner as the Lessor is now or shall at anytime hereafter be required or authorized by law to do; and shall and will keep all insurable property insured in reasonable amounts and rebuild all buildings and replace all property destroyed or deteriorated by fire or otherwise, to such an extent as to be unfit for use; and shall and will maintain, preserve and keep the railways and property hereby demised, including all property hereafter acquired, and every part thereof, in thorough repair, working order and safe 1856
and efficient condition, and supplied with rolling stock and equipment, so that the business of the said demised railways shall be preserved, encouraged and developed, the business thereof to be done with safety and expedition, the public be accommodated in respect thereto, with all practicable convenience and facilities and the future growth of such business as the same may arise or be reasonably anticipated be fully provided for and secured.

The Lessee further covenants and agrees, at the expiration or termination of this lease for any cause, to return and deliver the said railroad and railroads, real estate, and properties by this lease demised, including, among other things, all property, additions, improvements and equipments which shall be 1857
furnished, constructed or completed out of the proceeds of sale of the stock, bonds or property of the Lessor, to the Lessor in as good order, condition and repair as they were at the date this lease takes effect, or at the date when the same came into the possession of the Lessee, and to surrender said franchises, rights and privileges, easements and properties unimpaired by any act of the Lessee; excepting, however, all property of the Lessor sold pursuant to the terms hereof, the proceeds of which shall have been applied as herein provided.

The Lessee further covenants and agrees that it will at all times during the continuance of this lease, at its own expense, keep the said rolling stock, and tools, equipment, machinery and implements

necessary for the operation of the road, in good order, condition and repair, and will, as the same shall be worn out and rendered unserviceable, replace the same at its own expense, so that the said railroad and railroads shall always be kept, maintained and equipped in good and safe condition and effective working order.

The Lessee further covenants and agrees that it will at all times during the continuance of this lease, at its own expense, comply with all lawful requirements with respect to the construction, maintenance and operation of said railroads, extensions or branches thereof.

Article Tenth.—The Lessee covenants and agrees, at its own proper cost, from time to time, and whenever necessary for the use of the Lessor, to make out and furnish to said Lessor in duplicate any and all reports and statements which the latter shall or may hereafter be required by law to make and file; and to do and perform any and every act which the Lessor may from time to time be required by law to do and perform during the terms of this lease.

Article Eleventh.—The Lessee covenants and agrees that, in addition to the rentals herein elsewhere provided, it will pay and discharge as rent, as and when the same have or may become due, any and all taxes, assessments, license fees, water rents, duties, imposts, dues and charges whatsoever, whether ordinary or extraordinary, which previously to this lease have been or hereafter during the said term shall be levied, confirmed, assessed or imposed upon the Lessor, its capital, or shares of capital stock, or dividends, or upon the demised railroad or railroads, premises, real estate, personal property, franchises, easements, or any part thereof, or the business, earnings or income of the Lessor, or for the use or enjoyment thereof, by the United States, State, municipal or other lawful authority; provided, always, that the Lessee shall have the right before making such payment to contest the validity, legality, or amount of any such tax, assessment, license fee, water rents, duty, or charge upon any reasonable ground; and in case the same shall be contested as aforesaid, the time occupied in such contest shall

not be deemed a part of a reasonable time within which the Lessee is required to make such payment aforesaid. Should the Lessee fail to make any such payment aforesaid within the time herein required, then the Lessor may, after the expiration of said time, pay the same, with all accrued penalties, interest, costs and other charges connected therewith, and the Lessee agrees to repay as rent to the Lessor on demand the amount so paid.

The Lessee further covenants and agrees to pay as rent all rentals accruing or becoming payable during the continuance of this lease, under the terms of any contract or lease then existing between the Lessor and any person or corporation for the use of any real estate or property leased by the Lessor.

Article Twelfth.—Possession of the demised railways and premises shall be given by the Lessor to the Lessee at twelve o'clock and one second on the morning of the first day of April, nineteen hundred and three, and upon delivery of such possession, the Lessor shall transfer and deliver to the Lessee, for use upon or in connection with the said demised railways and premises, all moneys belonging to income account, (except moneys necessary to pay dividends previously declared), rolling stock, equipment, machinery, tools, implements, furniture, fuel, material or other railroad supplies belonging to the Lessor which shall have been procured for the use of the said railways.

The Lessee covenants and agrees to take over the leased property as a going concern, and agrees to pay all operating expenses due or to become due at or after the time of taking possession.

The Lessee shall at all times during this lease have the full and exclusive right to manage, use and control the demised property, and shall have, use and enjoy all the rights, powers and authority of the Lessor in that behalf, and all rights, powers, easements and privileges now possessed or which may hereafter be acquired by the Lessor necessary or convenient to the construction, maintenance, use, operation, possession and enjoyment of said railroad or railroads and any and all connections, extensions and branches thereof, which can or may be

lawfully exercised and enjoyed under its charter and the laws applicable thereto, in, about or in connection with said demised property and in the maintenance and operation thereof.

The Lessee may from time to time in its discretion, change, rebuild or duplicate the location or character of the whole or any part of any present or future line of railroad of the Lessor or change the motive power now used, or hereafter used, upon any such line, or the roadbed or structure of any such line, the consent of the Lessor having first been obtained, which consent the Lessor hereby agrees to give, provided the proposed action of the Lessee be reasonable and lawful.

Article Thirteenth.—The Lessee further covenants and agrees that it will proceed faithfully and diligently with the work of converting the said railroad and railroads into an electric railroad, and making all other improvements now contracted for, according to the present plans and contracts of the Lessor, but without assuming any liability under any of such contracts, and the Lessor covenants that it will facilitate and further such work by every means in its power, and will provide the funds therefor, by the sale of its capital stock, bonds or other property, real or personal, according to the provisions of Article Second hereof.

Article Fourteenth.—The Lessee further covenants and agrees that at the expiration of this lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished by the Lessee out of its own funds to the said railroad or railroads, otherwise than in compliance with the provisions of this Indenture, shall remain for use upon or as part of said demised property, and shall be and become the property of the Lessor upon the payment by the Lessor of the reasonable value thereof.

Article Fifteenth.—The Lessee further covenants and agrees upon the expiration or any sooner termination of this lease, to surrender, transfer and deliver to the Lessor all tools, machinery, materials

and supplies on hand for use in the construction, maintenance or operation of said railroads of value at least equal to that of such property delivered to the Lessee by the Lessor, and upon payment by the Lessor of the amount, if any, that the value of such property then delivered may exceed the value of such property delivered at the date this lease takes effect. And the Lessee further covenants and agrees at the expiration of this lease or any sooner termination thereof, that it will execute and deliver to the Lessor a good and sufficient deed conveying to the Lessor any real estate acquired and paid for by the Lessee for use in connection with the construction, maintenance or operation of said railroads and property, upon payment by the Lessor of the reasonable value thereof.

Article Sixteenth.—The Lessee further covenants and agrees that the Lessor, its officers and its duly authorized committee or agent may at all times during the term by this lease demised, enter in and upon and have free access to the railroads and properties by this lease granted and demised, that it will keep, full, true and correct books of account, to which books, and to all contracts, vouchers and agreements, the Lessor's officers, committee or agent aforesaid shall have free access at all reasonable times, and that all deeds, muniments of title, agreements and other papers relating to settlements with abutting owners, papers evidencing franchises and charters, stock books, transfer books, and the sale of the Lessor shall remain in the custody of the Lessor, whose approval until January first, 1906, shall be necessary to the purchase of any real estate or interests therein with its money, and to all settlements with abutting property owners, and that it (the Lessee) shall have access to such papers at all reasonable times, and that said Lessee will furnish to such officers, committee or agent every facility to examine into the condition of the said railroads and properties and the system and manner of operating said railroads, and will pay all expenses incident to an examination and report upon the condition of the railroads and equipment of the Lessor, to be made by an expert or experts of its selection not oftener

than once in three years, and will when and as required properly mark for identification all rolling stock of the Lessor and all replacements thereof, and will also from time to time pay all expenses of transfer and registration of stock, and of printing or engraving stock certificates.

Article Seventeenth.—The Lessee further covenants and agrees that it will at the expiration of or any sooner termination of this lease for any cause transfer, deliver and return to the Lessor moneys belonging to income account, equal in amount to such moneys received at the inception of this lease, also rolling stock, equipment, power stations, electrical appliances, and equipment, implements, furniture, fuel, office furniture and office fixtures, and all other property of like kind or nature then owned or possessed by it for use in the construction, maintenance and operation of said demised railroad and railroads, and the said property so returned shall be equal in quantity and value to similar property received by it at any time from the Lessor under the terms of this lease; excepting, however, all property sold pursuant to the terms hereof, the proceeds whereof shall have been applied in accordance with the provisions of this lease."

V. The lease from Manhattan to Interborough includes four main parallel lines extending generally in a northerly and southerly direction through the Boroughs of Manhattan and Bronx, in the City of New York, which as to routes and track mileage are as follows (distances stated approximately as of April, 1929):

Second Avenue Line, extending from Chatham Square along Allen Street, First and Second Avenues to 129th Street and Second Avenue, including a branch over the Queensboro Bridge from 59th Street and Second Avenue to the Queensboro Plaza, known as the Queensboro Bridge Line, having a total length of route of 9 miles and a track mileage aggregating 28 miles;

Third Avenue Line (including the so-called Suburban Line), extending from South Ferry in the Borough

of Manhattan along Pearl Street, the Bowery, Third Avenue, Webster Avenue and partly over a private right of way, to White Plains Road and Gun Hill Road, in the Borough of the Bronx, New York City, with an additional main line extending from Park Row at City Hall to Chatham Square and a branch known as the 34th Street branch, extending from Third Avenue and 34th Street to the East River, a branch known as the West Farms Subway connection extending from Willis Avenue and 143rd Street to 194th Street near St. Ann's Avenue, and a main line extension from Fordham Road to Bronx Park, having a total length of route of 17 miles and a 187
track mileage aggregating 58 miles;

Sixth Avenue Line, extending from Morris Street along Church Street, West Broadway, Sixth Avenue and West 53rd Street to a connection with the Ninth Avenue Line at Ninth Avenue and 53rd Street, having a total length of route of 5 miles and a track mileage aggregating over 11 miles;

Ninth Avenue Line, extending from South Ferry, in the Borough of Manhattan, along Greenwich Street, Ninth Avenue, West 110th Street, Eighth Avenue and over the Harlem River and partly over a private right of way to a connection with the City-owned Lexington 187
Avenue Subway Line at Jerome Avenue and 162nd Street, having a total length of route of 11 miles, with a track mileage aggregating 42 miles.

VI. On March 19, 1913, Public Service Commission of the State of New York issued a certificate known as the "Elevated Extension Certificate" authorizing the construction, equipment and operation of certain additional tracks upon its Second, Third and Ninth Avenue lines. On or about March 15, 1913, Manhattan and Interborough entered into an agreement providing among other things that the plant and property to be constructed by the Interborough under said Certificate shall

be deemed additions or improvements to the demised property made by Manhattan as lessor under the terms of the 1903 lease. On or about May 1, 1922, a so-called "Plan of Re-Adjustment" and agreement was entered into between Manhattan and Interborough whereby, among other things, Interborough waived any claim against Manhattan by reason of past expenditures for additions and improvements but subject to whatever rights might pertain to Interborough's bondholders. The licenses granted by the Commission under the Elevated Extension Certificate for the additional tracks above referred to are for a period of eighty-five (85) years only; all other franchises of Manhattan are perpetual.

VII. Pursuant to the Elevated Extension Certificate of March 19, 1913 and an agreement between Manhattan and Interborough dated March 15, 1913, Interborough issued approximately $47,000,000.00 of its bonds and notes to provide for the improvement above stated upon Manhattan's elevated lines and extensions thereof and that of said sum, approximately $27,000,000.00 was for improvements upon the lines and the power house leased from Manhattan.

VIII. Upon information and belief Interborough and the Receivers thereof are utilizing and employing power generated in Manhattan's power houses not only for the use of the Manhattan Lines but also for the operation of Interborough's own lines.

IX. When the plan of re-adjustment and agreement between Interborough and Manhattan was entered into on or about May 1, 1922, it was upon the representation, statements and official reports of Interborough that the revenues from the lines leased by Manhattan and the revenue from its own lines were insufficient to meet the payments required to be made by it under the 1903 lease, which payments included among other things, payments

of taxes, interest on the outstanding indebtedness of Manhattan and the payment of 7% on $60,000,000.00 of capital stock of Manhattan, which dividend guarantee called for the payment of $4,200,000.00 annually. As a result of such claims made by the Interborough to the stockholders of Manhattan, approximately 92% of the stockholders waived the 7% guarantee rate and agreed that the dividend should be 3% in 1923, 4% in 1924 and 5% each year thereafter and further agreed that such dividend rate should not be required to be guaranteed but should be paid only if earned. Since the year 1928 Interborough has failed to make all of the payments due under the modified plan and agreement although Interborough or Manhattan has earned sums sufficient to make such payments.

X. The authorized capital stock of Manhattan is 600,000 shares of the par value of $100 each, all of which is outstanding. Of this amount approximately $55,655,000.00 or 92.75% is subject to the modification agreement of May 1, 1922. The plaintiff is one of holders of shares who did not agree to the modification.

The Company has a funded debt of approximately $40,663,000.00 which is a first mortgage upon the company's entire property excluding the extensions built by Interborough. Said mortgage matures in the year 1990 and the trustee thereunder is the Central Hanover Bank and Trust Company of New York. Manhattan's properties are further encumbered by a second mortgage in the amount of approximately $4,500,000 which matures in the year 2013. Annexed hereto, marked Exhibit 1, is a comparative balance sheet of Manhattan for the years ending June 30, 1930 and 1931, showing total assets as of June 30, 1930 of $114,863,000 and for 1931 of $114,885,000.00; also a comparative statement of income account of Manhattan for the years ending June 30, 1930 and 1931 showing gross operating revenue for the year 1930 in excess of $18,000,000.00 and for 1931, $16,800,000.00.

Affidavit of J. Osgood Nichols.

XI. Upon information and belief, Interborough was incorporated on May 6, 1902 under the General Railroad Law of the State of New York with a 1000 year charter. In addition to operating the Manhattan elevated properties in the Boroughs of Manhattan and The Bronx as hereinabove alleged, it operates subway lines in the City of New York under certain leases commonly known as Contracts Numbered 1, 2 and 3. Upon information and belief the subway roads are owned by the City of New York but the power house, electrical equipment and rolling stock used for the purpose of operating the subways are owned by Interborough.

XII. On or about August 26, 1932, the American Brake Shoe & Foundry Company filed a creditor's bill against Interborough in this court, reference to which is made as if the same were incorporated herein and made a part hereof, alleging among other things that Interborough was without funds to meet the following obligations:

> "A. Interest for six months on ten-year secured gold notes due and payable September 1, 1932, $1,108,523.50.
>
> "B. The principal of said ten-year gold notes due and payable September 1, 1932, $31,672,100.
>
> "C. Six months interest on unsecured ten-year 6 per cent gold notes due October 1, 1932, $315,000.
>
> "D. Principal of said 6 per cent notes, $10,500,000.
>
> "E. Rental payments on Manhattan elevated lease, due October 1, 1932, $914,802.50.
>
> "F. Rental payments due to same, December 1, 1932, $90,460.
>
> "G. Interest and sinking fund due on first and refunding mortgages gold bonds, January 1, 1933, more than $4,400,000."

The complaint further states:

> "It is further alleged on information and belief that the only way whereby the defendant can meet

its obligations under said contracts, certificates and leases and pay its floating indebtedness and discharge its current obligations, is by the continued maintenance and operation of said railroad by the continuous use hereof." • • •

"Notwithstanding the fact that every effort has been made to provide funds for the payment of indebtedness and to procure additional income and revenues from operations of subway and elevated lines, such efforts have proved unsuccessful. Unless some definite action is taken on behalf of all the creditors so that the operation of the railroads may be continued, great and severe loss and irreparable injury will be inflicted upon all creditors. The credit of the defendants has been seriously impaired, and it has no reasonable hope of securing assistance from any quarter."

The bill prayed for the appointment of a Receiver. Upon information and belief Interborough admitted the allegations of the bill, consented to receivership and the Receivers above-named were appointed by this Honorable Court.

XIII. In addition to Interborough's admission of its inability to meet the foregoing charges, Interborough is in default in the payment of taxes to the City of New York not only upon its own property but upon the properties of Manhattan in very large amount, the amount due and owing for taxes to the City of New York upon the Manhattan properties being approximately $300,000.00 at the present time, which taxes Interborough is under obligation to pay on behalf of Manhattan, as provided for in the 1903 lease. As hereinabove alleged Interborough is also in default in substantial amount upon the Manhattan stock as provided in the terms of the modification agreement dated May 1, 1922, the amount in default at the present time aggregating the sum of about $1,000,000.00.

XIV. Interborough has continued the operation of Manhattan's properties under the lease aforesaid and

the modification thereof although it is in default in the payments due thereunder and has otherwise defaulted in carrying out the terms, covenants and conditions of said lease on its part to be performed.

XV. Upon information and belief, Interborough from the date of the lease from Manhattan to Interborough and continuously ever since has had charge of the management and the operation of the Manhattan elevated railroads and has operated the elevated lines and the subway lines as one unit. As hereinabove alleged, the construction of the subway, additions, alterations and extensions were made upon the elevated lines and upon the subway lines so as to connect the elevated lines and subway lines at numerous points and the elevated lines and subway lines have been operated practically as one unit. Use has been made by Interborough of the same rolling stock and equipment for the purpose of operating the elevated lines and subway lines interchangeably and together, as one unit. The fare charged for the operation of the subway and the elevated lines has been and is a single fare for a continuous passage from elevated lines to the subway lines and vice versa.

For the purpose of improving the facilities of the subway lines and the elevated lines and for the purpose of operating the same as a single unit for rapid transit in the City of New York, more particularly in Manhattan and the Bronx, additions and alterations were made upon the elevated lines, the third tracks and express lines were added to several of the elevated lines, the power houses of Manhattan were increased, and large sums of money were expended by Interborough upon the Manhattan properties. Additional burdens were placed upon Manhattan thereby in the operation and maintenance of its railway lines and its power houses. In or about the year 1913, in order to provide the requirements necessary for the operation and maintenance of the subway

and elevated lines as one unit, Manhattan, at the request of Interborough, caused to be placed an additional mortgage upon its property, real estate, elevated railways, structure and equipment, etc., in excess of $4,500,000, under a trust indenture dated June 1, 1913, and maturing June 1, 2013. The Equitable Trust Company of New York is named as Trustee; the bonds bear interest at the rate of 4% per annum.

XVI. On information and belief, since the enlargement of Manhattan's power house and increased electric transmission, it is now and has been supplying power to Interborough for the use of its cars and trains operated on its own lines and over Manhattan's lines. Whether or not any account is kept of the power supplied by Manhattan for the use and benefit of Interborough is to your complainant unknown, but since said properties are operated as a unit, if no proper account is kept, adjustment should be made of the operating accounts between the two companies which shall duly compensate Manhattan for the operation of cars used by Interborough on the Manhattan's lines and for the use of power furnished by Manhattan on Interborough lines.

XVII. Upon information and belief, the equipment of Manhattan has been sold from time to time and its rolling stock, tracks and other things necessary to the operation of the elevated lines have been changed and re-built, all under the direction of Interborough. The books and accounts of Manhattan relating to all these transactions have been kept by Interborough. A full and detailed accounting of all these transactions should be made for the benefit of all parties financially interested in Manhattan.

XVIII. Upon information and belief since the appointment by this court of the said Dowling and Murray as receivers of Interborough, they have continued to

operate the subways and the elevated structures as one unit as heretofore and said receivers will in all likelihood propose to continue to operate such properties; that it is necessary to operate the said properties for the public service and public benefit as a single unit; that great inconvenience to the public will undoubtedly result if operation of the elevated lines were divorced from the subway lines and all the connections between both lines were discontinued likewise, if the power and rolling stock necessary to the operation of both lines either separately or as a unit were separated, and if the men employed in the operation of both lines were divided and separated, serious danger to safe operation may result as well as inconvenience to the public and irreparable loss to Manhattan and its security holders and stockholders would follow.

XIX. There being defaults as heretofore alleged on the part of Interborough under the terms of the lease, and having announced that it is unable to meet its obligations under the lease as well as its other obligations, Interborough and its Receivers are continuing and will likely continue to make use of Manhattan properties without complying with the terms of the lease and modifications thereof; that they are appropriating the funds and revenue of Manhattan for the account and use of Interborough; that such appropriation will cause a default of all the bonds of Manhattan and probable foreclosure thereof; that no proper provision has been made for compliance with the terms of the lease and that the breaches already caused and those which are threatened will cause serious, irreparable injury and large financial losses to Manhattan, its stockholders and bondholders.

XX. On information and belief, a sharp conflict of interest exists between Interborough and Manhattan by reason of breaches of the lease by Interborough which have already occurred; that there are present and con-

tinuing breaches of the lease by reason of the use of Manhattan properties, appropriation of its income, properties, rolling stock, equipment, power houses, power supplied and other properties, personal, real and mixed, all belonging to Manhattan, without provision for compensation to Manhattan and to its security holders and stockholders; that the Receivers appointed for Interborough property are under duty to protect the interests of Interborough and since the receivers are making use of the property of Manhattan without making proper provision therefor, it is necessary in the interest of the stockholders, bondholders and/or other parties in interest of Manhattan, that proper protection should be provided to Manhattan and all parties having any interest in Manhattan and that a receiver should be appointed by this court to care for, preserve and protect the interests of Manhattan, to see to it that proper arrangements are made for the use of Manhattan properties during the period of receivership, and that proper revenue shall be received by Manhattan from the receivers of Interborough to protect Manhattan's stockholders, bondholders and other security holders.

XXI. Upon information and belief, Manhattan is now in default to the City of New York for non-payment of taxes, by reason of the fact that Interborough has failed and neglected to pay the taxes. That because of such failure, Interborough has caused a breach in the covenants and conditions of the indentures of trust given by Manhattan to the trustees for the payment of its outstanding bonds; that the threatened failure on the part of Interborough to pay the amounts required to be paid under the terms of the lease, namely, the interest to be paid to the mortgage bondholders of Manhattan, and the failure to comply with other provisions under the terms of said bonds will cause the bondholders to begin foreclosure proceedings and cause the property to be sold, the subway lines and elevated lines to be separated, the

unity under which both lines are now being operated to be disrupted. Great public injury and irreparable damage is likely to result to the public as well as to Manhattan, and all parties having a financial interest in Manhattan. The shareholders of the 7% stock have the right to begin individual actions against Interborough for the payment of the sum due and owing to them under the terms of the lease and there is likely to result a multiplicity of suits against Interborough and/or against the Receivers, if the Receivers shall fail to pay these shareholders.

Upon information and belief, the holders of Manhattan first mortgage bonds and second mortgage bonds, if there should be a failure to pay to them the interest which will presently become due, and the stockholders also, may have the right to begin proceedings against the Interborough to prevent the Interborough from making use of the elevated lines and its equipment and property and all property leased to it by Manhattan and if any injunction shall be issued by any court or courts to prevent Interborough from making use of the elevated lines upon any suit or suits instituted by bondholders or stockholders or by the Manhattan itself or by the trustees for the bondholders, serious and irreparable injury is likely to result to all parties in interest as well as to the public and the property of Manhattan is likely to be rendered useless and likewise and/or the property of the subway lines are likely to be greatly impaired and injured and to be rendered useless unnecessarily and cause great inconvenience to the public.

XXII. On information and belief, such parties in interest including said bondholders, stockholders, noteholders and the Manhattan company through its officers and directors are likely to institute suits in the State Court or in other courts of competent jurisdiction and great conflict, confusion and serious losses are likely to result from lack of co-ordination and conflicting jurisdic-

tion. Serious questions will arise between the State Court and the Federal Court as to jurisdiction of common properties and the common and respective rights of both companies.

XXIII. In the event of unification, or consolidation, merger, or re-organization of Interborough and Manhattan, the interests of both companies and of all of the security holders, stockholders and the public can best be served by having all the parties before one court having sole and exclusive jurisdiction over all of the parties and over all of the properties and all things concerning the locations, operation and maintenance of both companies.

With exclusive jurisdiction of this court over both companies and with exclusive jurisdiction of the receivers appointed by this court for both companies and with the familiarity of the court of all of the affairs, business and operations of both companies, this court will best be able to determine the right of both companies concerning their respective properties and will be best able to fix and apportion the revenues and expenses where the companies are operating jointly or as a single unit over the roads of both companies and further will best be able to fix and apportion the cost of power used in the operation of through trains from the road of one company to the road of the other and apportion the compensation of employees and other expenses used in such joint operation.

XXIV. Upon information and belief it is the duties of the Receivers of Interborough to protect Interborough and all parties financially interested therein. Questions of conflict must of necessity arise because of the operation of through trains over both roads. The determination as to what share of the revenue from such operation should go to Manhattan, should not be left to the Receivers of Interborough. Manhattan should be protected by its own receivers whose duty it will be to protect the

rights of Manhattan and all parties financially interested therein. Likewise Manhattan should not be left exposed to the danger of foreclosure suits caused by breaches of the mortgages on its properties with the attendant danger that receivers appointed in foreclosure actions in the State Court may attempt to bar continued operation of through trains from the Interborough tracks to the Manhattan tracks or vice versa. All parties can best be served by the appointment by this court of Receivers who shall serve the interests of all parties and who shall be directed and instructed by this court to cooperate with the receivers appointed by this court of Interborough to the end that there shall be no disruption of the public service and that the public may be assured that the receivers of both roads are acting under the instructions of this court with directions to continue to operate as a single unit as heretofore. The safety to the public in the high speed rapid transit of both companies can best be assured by this court taking exclusive jurisdiction of both companies.

XXV. On information and belief several of the directors of Interborough are interlocked with the directorate of Manhattan; that the following directors of Interborough are also directors of Manhattan: Rouhac Anderson, resident of New York City; Thomas L. Parkinson of the Chase National Bank, New York City; Finley J. Shepard of Tarrytown, New York. As such directors, they are now serving conflicting interests and are responsible for the performance of their duties as such directors to both companies. In addition thereto, the above-named persons constitute three of the four members of the Executive Committee of Manhattan and accordingly control said Executive Committee. Also, one Charles Hayden of New York City is also a director of Interborough as well as a director of Manhattan, and is also a member of the Executive Committee of Interborough and is now and has been for sometime past a

director of Brooklyn Manhattan Transit Company. These directors dominate and control Manhattan.

XXVI. Upon information and belief, for sometime past, plans have been proposed and considered for the unification of the subway and elevated lines of Interborough, Manhattan and Brooklyn Manhattan Transit, which operates a line of railways and subways in Brooklyn and Manhattan. Negotiations for the consummation of such a unification plan have been going on for a period of many years past. Representing as some of the officers and directors do, conflicting interests, the unification plan, upon which negotiations are still pending, has not been consummated because of this representation of conflicting interests. Under the plan for the unification of these systems of rapid transit, the Manhattan bondholders and shareholders were offered at the rate of $80.00 for every $100 bond and $60.00 for every share of stock of Manhattan. Substantial offers have been made to the holders of Interborough securities including bondholders and stockholders and substantial offers were also made to the security holders of Brooklyn Manhattan Transit Company. By reason of the failure on the part of Interborough to pay the taxes upon Manhattan properties and its inability to meet its obligations to Manhattan bondholders, foreclosure proceedings may result which may destroy the unified system existing between Manhattan and Interborough, and the benefits and advantages which the stockholders of Manhattan were to receive under the unification plan may be destroyed or lost unless this court shall take into its custody the Manhattan properties for the benefit of all parties, to the end that the proposed unification plan may eventually be accomplished and the interests of Manhattan, its bondholders, shareholders and security holders may be properly protected by the court's receiver or receivers.

The officers and directors of Manhattan by reason of the interlocking directorates and being dominated by In-

terborough and being unable to preserve and protect the property of Manhattan and having failed to protect the stockholders and security holders of Manhattan and having been unable to function in the interests of the shareholders and security holders for their proper protection by reason of the domination and control of Manhattan by Interborough, it is necessary and essential that Manhattan as well as Interborough shall be managed and controlled under the surveillance of this court through its receivers operating under orders and decrees of this court. Unless receivers are appointed, the property of Manhattan and the interests of the stockholders and the other security holders are likely to be irreparably injured, wasted or seriously diminished.

XXVII. On information and belief, Interborough has diverted large sums of money out of its revenues, gross and net income, and has paid the same to the City of New York, purporting to have paid same under the terms of contracts numbered 1, 2 and 3, as so-called rental for the subways, when it should have set aside such funds for the purpose of discharging its obligation to Manhattan and to its noteholders, bondholders and shareholders, as provided for under the terms of the lease; that the sums so paid to the City of New York amounting to several millions of dollars were paid over the protest of shareholders of Manhattan; that such payments were illegally made, and should not have been made to the City of New York until sufficient revenue had been set aside by Interborough to meet the obligations due and owing to Manhattan, its noteholders and shareholders as provided under the terms of the lease and/or its modification; that the officers and directors of Manhattan have known of such payments, but took no action to restrain or prevent Interborough from diverting such funds to the City of New York; that the failure on the part of the directors to protect the interests of Manhattan has caused great waste and loss to Manhattan, and further caused

a breach of the terms of the lease from Manhattan to Interborough.

The complainant further avers that other shareholders, residents of this jurisdiction, holding a substantial number of shares in addition to his own but unable to become parties to this action by reason of their residence here, also owners of both first and second mortgage bonds of Manhattan, who are residents of this district, have informed complainant that they too, urge the appointment of receivers by this court upon the allegations herein stated in order that all parties may be protected and safeguarded.

XXVIII. The complainant has made no demand upon the officers and directors of this corporation to institute proceedings for the relief herein sought for the reason that a great emergency exists for the immediate appointment of receivers of Manhattan upon the grounds that the receivers appointed for Interborough are appropriating the revenues from Manhattan on behalf of Interborough and are making no payments therefrom to Manhattan; that Manhattan has no funds of its own to meet obligations already due and owing, nor has it funds to meet payments to its bondholders which are presently to become due and owing; that with such a condition Manhattan may be forced to terminate its lease with Interborough forthwith and attempt to operate its own road; that in such event, it will have no funds with which to carry on such operation; that the continued operation of through trains from the Manhattan tracks to the Interborough tracks or vice versa may be disrupted; that the public service may and is likely to become seriously impaired and endangered; that with the uncertainties which have arisen in the minds of the public and among the employees of Interborough and Manhattan, grave danger is apt to arise in connection with the operation of the high speed trains and the rapid transit conducted by both roads; that assurances should be given to the

public and employees of both roads forthwith that the operation of Manhattan as well as Interborough will continue as heretofore and that the roads operations will be under the exclusive jurisdiction of and direction of this court; that no demand has been made upon the further grounds that Interborough having admitted in its answer that it is unable to meet the obligations due and owing from it to Manhattan and will be unable to meet the obligations due and becoming due from Interborough to Manhattan, various actions are likely to be instituted in different jurisdictions, including foreclosure actions and suits by stockholders and bondholders; that such actions will result in great confusion and complication and will endanger not only the rights of parties financially interested in Manhattan, but will cause great inconvenience and perhaps danger to the public as well, that this court should forthwith take immediate jurisdiction of Manhattan so that exclusive control of the operation of both roads and the through and connecting lines of both roads shall be vested under one authority.

Upon information and belief, the officers and directors of Manhattan have taken no action to safeguard the rights of Manhattan in the present situation and it is impossible to determine what, if any, action will be taken by them inasmuch as several of the directors of Interborough are also directors of Manhattan, and as heretofore alleged, three of the directors of Interborough constitute three of the four members of the Executive Committee of Manhattan; that the interests of these directors are conflicting and that it is impossible for such directors, particularly those controlling the executive committee of Manhattan to act independently and adequately and fully to protect the rights of Manhattan as against Interborough when acting in such dual position; that various questions of the rights of the Interborough and Manhattan must necessarily arise, particularly as to operating and maintenance costs and revenues, in connection with the operation of through trains from one line to the

other; the determination and apportionment of compensation to employees engaged in through train operations, the determination of the rights of Manhattan and Interborough on the extra trackage built by Interborough on Manhattan's roads and questions arising with respect to the liability of Interborough to Manhattan because of breaches of the lease by Interborough; the fixing of the rights of Manhattan as against Interborough in the event of unification, consolidation or merger of both roads; and the immediate determination by the court acting upon the advices of independent receivers of both companies as to the proper disposition and allocation of the revenues received by the receivers in the operation of Manhattan and Interborough; the determination as to what sums it shall be just and proper for the receivers of Interborough to pay to Manhattan's receivers; that such apportionment can best be done by having one jurisdiction over both properties.

Upon information and belief, the directors of Manhattan who are directors of Interborough have known for some time past that Interborough defaulted in the payment of taxes on Manhattan's properties and further have known that Interborough has earned sufficient money with which to pay the interest on the bonds and make payments to the stockholders of the corporation, and have known that notwithstanding such earnings, Interborough planned to default upon the payments about to become due the bondholders and/or stockholders of Manhattan; that Manhattan's directors have failed to protect and safeguard the rights of Manhattan and have failed to take proper action on account of Interborough's defaults. Because of the great emergency which exists, the intertwined relations between both companies, both financially and through their properties, the irreparable injury which is likely to occur, the danger of multiplicity of suits in other courts, and the confusion and complications which may result therefrom, the complainant has been impelled to apply to this court for

the protection of Manhattan, its noteholders, bondholders, shareholders and all other parties in interest, and to ask this court to take the property into its immediate custody and appoint receivers for the protection of all parties involved and thereby to safeguard Manhattan's properties and rights.

Further, if the receivers of Interborough disaffirm or attempt to disaffirm the lease with Manhattan, Manhattan will be unable to carry on the operations of lines having neither funds sufficient to do so nor a personnel of its own equipped or trained to carry on its operations. Without such funds, its transit facilities for the public will close down. With the appointment of receivers, receivers certificates may issue to borrow funds sufficient to maintain the operations of the lines and such receivers taking possession immediately will be able to procure expert personnel in time to continue the operations of the lines.

WHEREFORE, complainant files this bill of complaint on behalf of himself and all other stockholders for the benefit of the corporation, and prays

1. That an account shall be taken of all sums due and owing to Manhattan by Interborough;

2. That there shall be fixed and determined the amount to be paid by the receivers of Interborough to Manhattan for the use, occupation and operation of the properties, trackage facilities, railroad facilities, cars, equipment, power, compensation of employees and all other items properly chargeable to the receivers of Interborough;

3. That the damages caused by the breach of the lease between Manhattan and Interborough shall be fixed and determined, or in the alternative, that the court shall decree specific performance of the lease between Interborough and Manhattan;

4. That the court shall determine the respective rights, duties, obligations and liabilities of Manhattan

and Interborough and shall enter such order, decree and judgment as shall seem equitable and meet in the premises;

5. That this Honorable Court will forthwith appoint a receiver or receivers of all and singular the property and assets of every nature, wheresoever situated, held, owned or controlled by Manhattan, with full power and authority to take into their possession, hold, manage and operate the business and properties of the defendants, and receive and collect the rents, issues and profits thereof, with such powers as this Honorable Court may from time to time grant, including the power to borrow money on receiver's certificates or otherwise, and for that purpose to incur such expenses as may be necessary or advisable in connection therewith, to purchase and sell, for cash or on credit, such merchandise, supplies, equipment, materials or other property as may be necessary or advisable in connection with the administration of the assets of Manhattan and the continuation of its business to such extent as may be authorized by this Honorable Court; to bring suit for, collect, receive and take into his or their possession all the property and assets, real, personal, or mixed, goods, chattels, credits, rights, claims and equities, books, papers, securities, cash and other property whatsoever and wheresoever situated; and in continuing, managing and operating said business, so far as authorized by this Honorable Court, to act in association with any receiver or receivers who may be appointed by any other court to take possession of and operate any property of said Manhattan situated outside the jurisdiction of this court, and to that end to transfer and consent to the transfer from time to time of such raw materials, materials in process, finished products, moneys and credits to and from this jurisdiction and any such other jurisdiction for the purpose of said business to the extent that the conduct thereof may from time to time reasonably require, and to cooperate to the fullest extent with any such other receiver or receivers in continuing, managing and operating said business, so far

as authorized by this Honorable Court, as a whole, and in arranging for and making such transfers; to appoint and employ such managers, agents, employees, servants, accountants, attorneys and counsel as may in his or their judgment be advisable or necessary in the management, conduct, control or custody of the affairs of the defendants and of the assets thereof, and to make such payments and disbursements as may be needful or proper for the purposes aforesaid or otherwise for the preservation and operation of the properties of Manhattan, so far as authorized by this Honorable Court, including authority to make payment of debts entitled to priority and of the wages and salaries of agents, employees, laborers and servants of said Manhattan, accrued or to accrue, which are entitled to priority by statute or which said receiver or receivers shall deem to be necessary or expedient to pay to secure the continuation of their services or to avoid detriment to the working organization of the business; to institute, prosecute and defend, compromise, adjust, intervene in or become a party to suits, actions, proceedings at law, in equity, or in admiralty, including ancillary proceedings in state or federal courts or courts of foreign nations, and likewise to defend, compromise or adjust, or otherwise dispose of any or all suits, actions or proceedings instituted against him or them as receiver or receivers or against Manhattan, and also to appear in and conduct the prosecution or defense of any suit or adjust or compromise actions or proceedings now pending in any court by or against Manhattan, and to compound and settle with all debtors of said defendants, with persons having possession of its property, or in any way responsible at law or in equity to Manhattan, and with the further usual powers of receivers in such cases; and that the officers, managers, superintendents, agents, attorneys, and employees of Manhattan be required forthwith to deliver up to said receiver or receivers the possession of all and every part of the properties of the defendant Manhattan, wheresoever situated, including the several books, vouchers and papers in any way relating

to the business or corporate proceedings of the defendant;

6. That this Honorable Court administer all and singular the property rights and business belonging to Manhattan and will adjudicate, enforce and adjust the rights, liens, equities and claims of all the creditors of the defendants, including the claim of complainants, as the same may be determined; to adjust the rights between Manhattan and Interborough;

7. That all creditors, stockholders and other persons be enjoined permanently and pendente lite from instituting or prosecuting or continuing the prosecution of any actions, suits or other proceedings at law or in equity or under any statute against Manhattan, and from levying any attachments, executions or other processes upon or against any of the properties of Manhattan, and from taking or attempting to take into their possession any part of the property of Manhattan, and from doing any act whatsoever to interfere with the possession of and management by the said receiver or receivers of the properties of Manhattan, or in any way to interfere with the said receiver or receivers in the discharge of his or their duties, or to interfere in any way with the administration and disposition in this suit of the affairs and properties of Manhattan;

8. That all creditors of Manhattan, and all persons interested in Manhattan be permitted to intervene in and become parties to this suit if and as permitted and authorized so to do by this Honorable Court;

9. That this complainant shall have such other and further relief as to the court may seem just and equitable in the premises together with the costs of this action.

LAWRENCE BERENSON,
Attorney for Complainant,
Office & P. O. Address,
One Wall Street,
Borough of Manhattan,
City of New York.

EXHIBIT 1.

COMPARATIVE BALANCE SHEET, JUNE 30.

Assets	*1931*	*1930*
Cost of road and equipment...	$ 98,929,654	$ 98,929,654
Cost of leases	14,014,000	14,014,000
Special deposits	1,020	1,020
I. R. T. Co. lease account.....	377,323	377,323
Unamortized bond discount and expenses	610,456	611,930
Miscellaneous assets	869,123	867,648
Cash	70,882	49,165
Accounts receivable	12,963	13,013
937 Total assets	$114,885,421	$114,863,753
Liabilities		
Capital stock (par $100).....	$ 60,000,000	$ 60,000,000
Prem. on cap. stk.	1,809,382	1,809,382
Funded debt	45,206,000	45,206,000
Current Liabs.	3,602	3,328
Suspense acct.	268,803	268,803
Surplus	7,597,634	7,576,240
Total liabilities	$114,885,421	$114,863,753

EQUITIES FOR STOCK—Balance sheet, June 30, 1931, indicated total book value of $54,782,560 (excluding $610,456 un-amortized bond discount and expense and $14,014,000 cost of leases, but including $1,809,382 premium on capital stock applicable to the 938 600,000 shares of capital stock (par $100), or $91.30 per share, compared with $92.60 per share on June 30, 1930.

INCOME ACCOUNT, YEARS ENDED JUNE 30 (leased lines only—excluding jointly operated properties)

	1931	*1930*
Gross revenue	$16,803,896	$18,001,319
Operating exp.	13,254,944	13,823,748
Taxes	1,936,463	1,969,884
Operating inc.	1,612,489	2,207,687
Other income	18,447	84,859
Total income	1,630,936	2,292,546
Bond int. & rentals	1,926,169	1,938,203
Net income	d 295,233	354,343
Dividend requir.	3,087,020	3,087,020
Avail. for I. R. T. charges.....	d 3,382,253	d 2,732,677
	Times Earned	
Fixed charges	0.85	1.18

d Deficit.

Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HARRY BARBER,
Complainant,
against

MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as RECEIVERS OF THE INTERBOROUGH RAPID TRANSIT COMPANY, and THE CITY OF NEW YORK,
Defendants.

Upon reading and filing the bill of complaint herein, verified August 29, 1932, and the annexed affidavit of Lawrence Berenson, verified the 29th day of August, 1932, and the exhibits annexed to the complaint,

ORDERED, that the defendants or their attorneys show cause before this court, at Room 439 of Old Post Office Building, Park Row, Borough of Manhattan, New York City, on the 6th day of September, 1932, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why orders should not be issued appointing a receiver or receivers of the defendant Manhattan Railway Company, and why the complainant should not have such other and further relief as to the court may seem just and proper in the premises.

Sufficient reason appearing therefor, let the service of a copy of this order and the annexed affidavit upon the defendants above named or their attorneys on or before the 31st day of August, 1932, be deemed sufficient service thereof.

Dated: New York, August 29th, 1932.

(Sgd) MANTON

Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HARRY BARBER,
Complainant,
against

MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as RECEIVERS OF THE INTERBOROUGH RAPID TRANSIT COMPANY, and THE CITY OF NEW YORK,
Defendants.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of LAWRENCE BERENSON respectfully shows and represents:

1. That he is the solicitor for the complainant in the above entitled action and is duly admitted to practice before this court and in all other courts in the State of New York.

2. That this petition is filed on behalf of the complainant and at his request, because the complainant is not within this jurisdiction, being a citizen of and resident of Boston, Massachusetts, where he is at the present time.

3. That the complainant is a record holder of twenty (20) shares of the capital stock of the defendant Manhattan Railway Company, of which the complainant has informed your petitioner he has been such holder of record continuously for more than one year, and prior to the time of the transactions complained of in the bill of complaint herein; that complainant did not acquire

such shares for the purpose of bringing a collusive suit or for the purpose of conferring jurisdiction of this action upon this court, and that this suit is not a collusive one and is brought in good faith for the benefit of the Manhattan Railway Company.

4. That your petitioner is counsel for other persons financially interested in the Manhattan Railway Company, to wit, the holder of two hundred and thirty (230) shares of stock of the company, having a par value of $23,000, and $10,000 of the second mortgage bonds of the company. Your petitioner has also been consulted by other owners of capital stock of the company, holding substantial numbers of shares therein. That said persons have not joined in this suit because they are residents of the State of New York. But the holder of the two hundred and thirty (230) shares of the 7% capital stock of Manhattan Railway Company and the owner of the $10,000 bonds has read the bill of complaint herein and is familiar with all of the allegations thereof, and has requested your petitioner to state that he favors and urges the relief sought herein and the appointment of receivers for Manhattan Railway Company. 19

5. Your petitioner avers that receivers should be appointed forthwith for the Manhattan Railway Company upon the grounds set forth in the bill of complaint therein and the allegations therein contained. 194

Wherefore, your petitioner prays that the prayers for relief contained in the bill of complaint be granted by this Honorable Court and that receivers of Manhattan Railway Company be appointed as set forth in said prayers. That no previous application has been made for this relief.

Dated: New York, August 29th, 1932.

(Sgd) Lawrence Berenson,
Petitioner,
Office & P. O. Address,
One Wall Street,
Borough of Manhattan,
New York City.

Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HARRY BARBER,
Complainant,
against

MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as RECEIVERS OF THE INTERBOROUGH RAPID TRANSIT COMPANY, and THE CITY OF NEW YORK,
Defendants.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

LAWRENCE BERENSON being duly sworn, deposes and says:

That he is the solicitor for the Complainant in the above entitled action; that your deponent knows of no other suits pending against the defendant Manhattan Railway Company for the relief sought herein or for the appointment of a receiver of said Manhattan; that your deponent made inquiry in this court to ascertain whether any suit of like or similar nature had been filed, and he was informed that no such bill has been filed up to the present time; that he has read the morning and evening editions of newspapers published in the City of New York for the past three weeks and has not

observed in such newspapers any news item referring to a suit similar or of like nature to the present action.

To the best of your deponent's knowledge, information and belief no similar suit has been filed in this court or in the courts of the State of New York, or elsewhere.

(Sgd) LAWRENCE BERENSON.

Subscribed and sworn to before me
this 29th day of August, 1932.
SIDNEY BURGER
Notary Public
(SEAL) New York County #1589
Com. expires March 30, 1933.

Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HARRY BARBER,
Complainant,
against

MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as RECEIVERS OF THE INTERBOROUGH RAPID TRANSIT COMPANY, and THE CITY OF NEW YORK,
Defendants.

ORDER AND PETITION.

This cause came on to be heard at this term, and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED as follows, viz.:

1. That the prayer of the petition annexed of Lawrence Berenson, verified August 29, 1932, be and the same hereby is granted, and that leave hereby is given to the complainant to file in this Court the bill of complaint mentioned in said petition, with said defendant Interborough Rapid Transit Company and said Receivers among the parties defendant thereto.

Dated, New York, August 29th, 1932.

MANTON,
U. S. J.

Affidavit of J. Osgood Nichols. 19

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HARRY BARBER,
Complainant,
against

MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as RECEIVERS OF THE INTERBOROUGH RAPID TRANSIT COMPANY, and THE CITY OF NEW YORK,
Defendants. 19

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of LAWRENCE BERENSON respectfully shows to this Honorable Court:

1. That he is the solicitor for the complainant in the above entitled action. 195

2. That Messrs. Victor J. Dowling and Thomas E. Murray were duly appointed Receivers by this Court on or about August 26, 1932, of the above named Interborough Rapid Transit Company.

3. That upon information and belief, the order appointing such Receivers contains certain restraining provisions among them restraining the institution or prosecution of suits against the Interborough Rapid Transit Company aforesaid.

Affidavit of J. Osgood Nichols.

4. That your petitioner respectfully begs leave of this Court to make the Interborough Rapid Transit Company a party defendant in this suit and that the Receivers above named of said Interborough also be joined as parties defendant upon the grounds that said Receivers are operating the lines of the defendant Manhattan Railway Company, of which complainant is a stockholder, and that an accounting of such operation should be made by Interborough Rapid Transit Company and its Receivers for the use and operation of Manhattan's lines, for the use of its power houses, trains, tracks, station facilities, etc. and also for the other matters referred to in the bill of complaint herein which is incorporated herein by reference and made a part hereof.

Wherefore, your petitioner prays leave of this Honorable Court to file its said bill of complaint and to include among the parties defendant thereto Interborough Rapid Transit Company and said Receivers, and that an order granting such relief may be made by this Honorable Court, and entered in the above entitled cause.

And your petitioner, as in duty bound, will ever pray, etc.

Lawrence Berenson,
Petitioner,
Office and Post Office Address,
One Wall Street,
Borough of Manhattan,
New York City.

Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In conformity to the provisions of Section 18 of the Judicial Code of the United States, the public interest requiring such action, HON. E. HENRY LACOMBE U. S. Circuit Judge is hereby designated and appointed to hold a district court in the Southern District of New York, beginning Monday April 22d 1912 for the trial of civil jury causes and the disposition of such other business as may come before him at such session.

New York, April 9th, 1912.

E. HENRY LACOMBE
Senior Circuit Judge.

Filed Apr. 10, 1912.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PARSONS NON-SKID COMPANY, Limited, and WEED CHAIN TIRE GRIP COMPANY,

Complainants,

against

W. E. PRUDEN HARDWARE COMPANY,

Defendant.

It appearing to me from the bill of complaint and papers on motion for preliminary injunction filed in the office of the clerk of the United States District Court

for the Southern District of New York in the suit brought by Parsons Non-Skid Company, Limited, and Weed Chain Tire Grip Company, Complainants, against W. E. Pruden Hardware Company, Defendant, now pending in said court that public interest requires that all motions, the final hearing and all other court proceedings herein be made and had and determined by Honorable E. Henry Lacombe, a judge of the United States Circuit Court of Appeals for the Second Circuit in which said district lies.

I do hereby designate and appoint Honorable E. Henry Lacombe, a judge of the United States Circuit Court of Appeals for the Second Circuit, to hold the United States District Court for the Southern District of New York for the purposes of hearing and determining all motions to be made and the final hearing to be had, and all other court proceedings in said suit.

Dated, New York January 17, 1913.

E. Henry Lacombe
Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Circuit.

Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PARSONS NON-SKID COMPANY, LIMITED, and WEED CHAIN TIRE GRIP COMPANY,

Complainants,

against

EDWIN S. HOLMES, JR., RANDOLPH T. WARWICK, LEO TOBRINER, CHARLES BAUER and Q. D. HOOK COMPANY,

Defendants.

It appearing to me from the bill of complaint and papers on motion for preliminary injunction filed in the office of the Clerk of the United States District Court for the Southern District of New York in the suit brought by Parsons Non-Skid Company, Limited, and Weed Chain Tire Grip Company against EDWIN S. HOLMES, JR., RANDOLPH T. WARWICK, LEO TOBRINER, CHARLES BAUER and C. D. Hook Company, defendants, now pending in said Court that public interest requires that all motions, the final hearing and all other court proceedings herein be made and had and determined by Honorable E. Henry Lacombe a Judge of the United States Circuit Court of Appeals for the Second Circuit in which said district lies.

I do hereby designate and appoint Honorable E. Henry Lacombe, a Judge of the United States Circuit Court of Appeals for the Second Circuit, to hold the United States District Court for the Southern District of New York for the purposes of hearing and determin-

ing all motions to be had, and all other Court proceedings in said suit.

Dated, New York, January 17, 1913.

E. HENRY LACOMBE,
Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interest and under the authority conferred by Sec. 18 of An Act to Codify, Revise and Amend the Laws relating to the Judiciary, approved March 3rd, 1911, as amended, I hereby designate United States Circuit Judge E. HENRY LACOMBE, to hold sessions of the District Court for the Southern District of New York for the hearing of motions on July 29th, August 12th and September 9th, 1914.

The date of any of these assignments may be changed at the pleasure of the Judge assigned to sit, to some other regular motion day.

E. HENRY LACOMBE
Senior Circuit Judge,
Second Circuit.

Filed June 30, 1914.

Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interest and under the authority conferred by Sec. 18 of An Act to Codify, Revise and Amend the Laws relating to the Judiciary, approved March 3rd, 1911, as amended, I hereby designate United States Circuit Judge E. HENRY LACOMBE, to hold sessions of the District Court for the Southern District of New York for the hearing of motions on July 14th, August 11th and September 15th, 1915.

The date of any of these assignments may be changed at the pleasure of the Judge assigned to sit, to some other regular motion day. 1

E. HENRY LACOMBE
Senior Circuit Judge,
Second Circuit.

Actually sat July 31.
Filed June 16, 1915.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interest and under the authority conferred by Section 18 of an Act to Codify, Revise and Amend the Laws relating to the Judiciary approved March 3, 1911, as amended, I HEREBY DESIGNATE AND APPOINT United States Circuit Judge HENRY GALBRAITH WARD, to hold a session of the District Court for the Southern District of New York for the trial of Admiralty causes, beginning on May 7, 1918. 19

Dated, April 29, 1918.

H. G. WARD
Senior Circuit Judge
of the Second Circuit.

Filed Apr. 29, 1918.

Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interests and under the authority conferred by Section 18 of The Judicial Code as amended, I HEREBY DESIGNATE and APPOINT United States Circuit Judge HENRY GALBRAITH WARD to hold a session of the District Court for the Southern District of New York for the trial of causes and the hearing and disposition of such business as may come before him during the period beginning June 2, 1919 and ending June 30, 1919.

Dated: May 27, 1919.

H. G. WARD
Senior Circuit Judge of the
Second Circuit.

Filed May 27, 1919.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interest and under the authority conferred by Section 18 of the Judicial Code as amended by the Act of Congress approved September 14, 1922, I HEREBY DESIGNATE AND APPOINT United States Circuit Judge HENRY WADE ROGERS of the Second Circuit to hold a session of the District Court for the Southern District of New York for the trial of causes and the hearing and disposition of motions, petitions for naturalization, and such exparte and other business as may come before him during the period beginning May 11, 1923, and ending May 12, 1923.

Dated, May 11, 1923.

HENRY WADE ROGERS
Senior Circuit Judge of the
Second Circuit.

Filed May 11, 1923.

Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interest and under the authority conferred by Section 18 of the Judicial Code as amended by the Act of Congress approved September 14, 1922, I HEREBY DESIGNATE AND APPOINT United States Circuit Judge CHARLES M. HOUGH of the Second Circuit to hold at any time a session, or sessions of the District Court for the Southern District of New York for the trial of causes and the hearing and disposition of motions, petitions for naturalization, and such ex-parte and other business as may come before him.

Dated: September 16, 1926.

CHAS. M. HOUGH
Senior Circuit Judge
of the Second Circuit.

Filed Sep. 16, 1926.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interest and under the authority conferred by Section 22 of Title 28 of Code of Laws of the United States, I HEREBY DESIGNATE AND APPOINT UNITED STATES CIRCUIT JUDGE MARTIN T. MANTON of the Second Circuit to hold at any time a session, or sessions of the District Court for the Southern District of New York for the trial of causes and the hearing and disposition of motions, petitions for naturalization, and such ex-parte and other business as may come before him.

Dated: March 20, 1930.

MARTIN T. MANTON,
Senior Circuit Judge of the
Second Circuit.

984 *Affidavit of J. Osgood Nichols.*

DESIGNATION OF HONORABLE EDMUND WADDILL, JR., CIRCUIT JUDGE, TO HOLD A DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

UNITED STATES OF AMERICA,

FOURTH CIRCUIT.

It appearing to the undersigned, Senior Circuit Judge in and for the Fourth Judicial Circuit upon the motion of the United States Attorney, that the public interest
985 requires the designation of some circuit Judge to hold a District Court of the United States for the Eastern District of Virginia, at Norfolk, I do hereby, in conformity with the provisions of Section 18 of the Judicial Code, as amended by the Act of Congress approved September 14, 1922, designate and assign the Honorable Edmund Waddill, Jr., United States Circuit Judge for the Fourth Judicial Circuit, to hold said District Court of the United States for the Eastern District of Virginia, at Norfolk, on the 23rd day of August, 1928, in the matter of the removal proceedings against Manville H. Sprague.

GIVEN UNDER MY HAND in the said Fourth Judicial Circuit, this 23rd day of August, in the year of our Lord
986 one thousand nine hundred and twenty-eight.

The Clerk of the said District Court of the United States for the Eastern District of Virginia shall enter and transmit a certified copy of the above designation and assignment to the Honorable Edmund Waddill, Jr., and the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va., forthwith.

EDMUND WADDILL, JR.,
Senior Circuit Judge, Fourth Circuit.

(SEAL)

A true copy teste:

JOSEPH P. BRADY, Clerk,
By PAUL R. FLANAGAN, Deputy Clerk.

Affidavit of Martin A. Leach.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, Complainant, *against* MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Defendants.	IN EQUITY E 71-153 1932.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARTIN A. LEACH, being duly sworn, deposes and says:

I was present in Judge Manton's chambers during the hearing on September 6, 1932, on a motion by the plaintiff in the action of *Barber* v. *Manhattan Railway Company et al.* for the appointment of a receiver for Manhattan Railway Company.

Affidavit of Martin A. Leach.

During the course of that hearing, I made a complete stenographic report of everything said. The excerpts quoted in the affidavit of J. Osgood Nicolls are a true and correct copy of the verbatim report of the proceedings held before Judge Manton on September 6, 1932.

MARTIN A. LEACH

Sworn to before me this
5th day of October, 1932.

ROWLAND W. PHILIPS
Notary Public, Nassau County
New York County Clerk's No. 392
Kings County Clerk's No. 130
Commission expires March 30, 1934
(SEAL)

Affidavit of William Roberts.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WILLIAM ROBERTS, being duly sworn, deposes and says:

On September 6, 1932, he was appointed Temporary Receiver of the Manhattan Railway Company in a cause in Equity E 70-364 pending in the United States District Court for the Southern District of New York, and that he

is the person referred to as Tempoary Receiver of Manhattan Railway Company in an order to show cause, signed by Francis G. Caffey, United States District Judge in the above entitled proceeding, which order is dated September 21, 1932, and returnable on October 4, 1932.

The order to show cause was secured on a petition and complaint by one Benjamin F. Johnson, who alleges that he is the owner of 100 shares of stock of Manhattan Railway Company. Deponent submits this affidavit in answer to certain allegations of the bill of complaint herein, which by reference in the petition for the order to show cause are among the grounds for complainant's prayer that the order appointing deponent temporary receiver for the Manhattan Railway Company should be vacated and set aside.

In paragraph "(14)" of the bill of complaint, complainant refers to the appointment of deponent as receiver for Manhattan Railway Company and makes a general charge that his continuance in office does not and will not insure independence of action or protection of its creditors and security holders. The particulars of this general charge are alleged in paragraph "(16)" of the bill of complaint as follows:

> "That said William Roberts was and is the President and Counsel for the Manhattan Railway Company, and it is believed that his appointment was sponsored and made at the instance of the Brooklyn - Manhattan Transit Company - Interborough interests, and not at the instance or sponsorship of complainant or any of the other stockholders of Manhattan. Complainant believes, and therefore avers, that said appointment of William Roberts was irregular and improper. Moreover, that there is an urgent need of the appointment of a receiver for Manhattan who is familiar with the operating end of the elevated lines, and one who is independent, without connection with or domination by Interborough and/or Brooklyn-

> Manhattan Transit Company. Complainant believes that such independent receiver or receivers should be one well experienced in the operation of traction companies, as well as one thoroughly familiar with receiverships and reorganizations, and well grounded on finance and in the financial set up of Manhattan."

Deponent has not had and has not now any desire to be appointed to or continue in the office of Receiver of Manhattan Railway Company if, in the judgment of the Court having jurisdiction in the premises, anyone more highly qualified for the duties of that office might be secured, and he is content to leave the question of his qualifications and fitness for such office to the judgment of such Court. He states, however, that the allegations above quoted to the general effect that his conduct as Receiver will not insure independence of action or protection of creditors and security holders interested in the Manhattan Railway Company, and the imputation that he is connected with or dominated by Brooklyn-Manhattan Transit Company-Interborough interests are utterly without foundation and are refuted by deponent's entire course of conduct since the year 1922. The facts regarding deponent's connection with Manhattan Railway Company are as follows:

In 1922 the Interborough Rapid Transit Company was unable to discharge all of its obligations as they matured and a readjustment of the obligations of that company became necessary in order to avoid a receivership. A Plan of Readjustment was thereupon prepared and adopted under which certain changes were made in the obligations of the Interborough Company, including its obligations to the stockholders of Manhattan Railway Company under a lease of its properties made in 1903 by the Manhattan Railway Company to the Interborough Rapid Transit Company for a long term of years. The

law firm of which deponent was then a member acted as counsel for the committee which represented the stock of the Manhattan Railway Company in the negotiation, preparation and adoption of the Plan of Readjustment. Upon the completion of the Plan, the leading stockholders of Manhattan Railway Company, who held no shares of stock in, and were not even remotely connected or identified with, the Brooklyn-Manhattan Transit Company or the Interborough Company, suggested that deponent's firm which had acted as counsel for the stock committee should continue to act as counsel for Manhattan Railway Company and that deponent should become a member of the Board of Directors of the Company and act as its President.

Deponent was thereupon in the year 1923 elected a member of the Board of Directors of Manhattan Railway Company and President of the Company. Deponent had not at the time of his said election, or prior thereto, any connection with either the Brooklyn-Manhattan Transit Company or the Interborough Rapid Transit Company, and has had none since, except that from about the year 1924 to some time in the year 1931, he was one of the three representatives selected by the Manhattan Company to the Board of Directors of the Interborough Company under the provisions of the Plan of Readjustment hereafter mentioned. He is not and never had been the owner, or otherwise interested in, any securities of the Brooklyn-Manhattan Transit Company or the Interborough Rapid Transit Company. Deponent has never acted otherwise than solely and exclusively in the interest of Manhattan Railway Company and of the holders of its securities.

Deponent does not know of any sponsoring of his appointment as Receiver by anyone and believes that his appointment was made solely for the reason that ten years of service as President of the Manhattan Company

had given him a thorough knowledge of the very complicated problems affecting that Company, which would be most important in the administration of such a trust, and that his record was such as to assure the greatest possible protection of the interests of the Manhattan Company in dealing with the questions arising out of its relations with the Interborough Company. * * *

In paragraph "24-b" of the complaint complainant Johnson alleges:

> "Upon information and belief, as several of the directors of Interborough are also directors of Manhattan, and as heretofore alleged, three of the directors of Interborough constitute three of the four members of the Executive Committee of Manhattan; that the interests of these directors are conflicting and that it is impossible for such directors, particularly those controlling the executive committee of Manhattan to act independently and adequately and fully to protect the rights of Manhattan as against Interborough when acting in such dual position; * * *"

Deponent states the facts to be as follows:

Eighteen directors compose the entire Board of Directors of Interborough Rapid Transit Company, and thirteen directors compose the entire Board of Directors of Manhattan Railway Company. In view of the fact that the Plan of Readjustment made in 1922 affected the bonds of the Interborough Company, through the postponement for five years of the sinking fund on such bonds, and also affected the stock of the Manhattan Company in that the rate of dividend rental on the stock which assented to the Plan of Readjustment was reduced and made dependent upon earnings, the following provision was made in Article V of the Memorandum of Definitive Provisions, which supplemented the Plan of Readjustment:

"The number of directors of the Interborough Company shall be increased from fifteen to eighteen, to be divided into three equal classes so that six directors shall be elected each year for a term of three years. Nine of said directors shall be elected by the Interborough Company's stockholders, or upon nomination of the holders of Voting Trust Certificates therefor, and the other nine shall be elected by, or upon the nomination of, the following:

(a) By the Transit Commission of the State of New York and/or the Board of Estimate and Apportionment of the City of New York (or by any other commission, board or officer in which the powers of the Transit Commission or the Board of Estimate and Apportionment shall hereafter be vested by law), as and in such manner as may be determined by said Transit Commission.

3 directors.

(b) By the Manhattan Company in such manner as shall from time to time be provided in its by-laws or, if there shall be no by-laws in force regulating such election, by its board of directors.

3 directors.

(c) By registered holders of the Interborough Company's First and Refunding Mortgage Bonds.

3 directors."

Under the foregoing provisions of the Plan, as supplemented, the Manhattan Railway Company had the right to nominate three out of the eighteen directors of Interborough Company, but in no event had the Interborough Company the right to nominate directors to the Board of the Manhattan Company. Aside from the three representatives which the Manhattan Company appointed to the Board of Directors of the Interborough Company under the Plan aforesaid, the only person who is or has

been a director of both the Interborough Company and the Manhattan Company is Mr. Charles Hayden.

In the supplemental bill of complaint filed herein, complainant alleges (paragraph 11) that Manhattan Railway Company has been under domination and control of Interborough Rapid Transit Company ever since it took over the properties of the Manhattan Company in 1903.

Deponent has been familiar with the affairs of the Manhattan Railway Company since 1922, and states of his own knowledge that since that date at least it has not in any way or to any extent been dominated or controlled by the Interborough Company, but that, on the contrary, the Manhattan Company has always acted independently of the Interborough Company, and, whenever necessary to enforce rights of the Manhattan Company, has acted in opposition to the Interborough Company.

Complainant further alleges in the supplemental bill (paragraph 11) that, despite the protests of the holders of the modified stock of the Manhattan Company that sufficient earnings have been made to pay dividends to them during the past few years, no accounting has ever been procured from the Interborough Company by the directors of the Manhattan Company for the purpose of ascertaining the exact status of operations of the lines of the Manhattan Company, although the lease of the Manhattan Company provides that it may employ accountants at the expense of the Interborough Company to ascertain the earnings from the lines of the Manhattan Company. Deponent states the facts to be as follows:

After the Plan of Readjustment became effective the Board of Directors of the Manhattan Company first employed engineers of its own selection and at its expense to make monthly reports to the Board of Directors of the Manhattan Company of the net earnings of the Interborough System and of the earnings of the elevated

properties, operated by the Interborough Company; also employed accountants to make similar monthly reports independently of the engineers. Copies of such reports were sent monthly to each of the directors of the Manhattan Company.

The dividend rental on the stock of the Manhattan Company which had not assented to the Plan of Readjustment was paid in full, up to but excluding October 1, 1932, and the maximum dividend rental payable on the assenting stock was paid up to July 1, 1928. One of the principal causes of the discontinuance of the payment of dividend rental on the assenting stock was the settlement in August, 1929, by the City of New York and the Interborough Company of the dispute concerning the accounts under the subway contract between the City and the Interborough Company (Contract No. 3); the City contended that for many years the Interborough Company had improperly charged against subway revenue various substantial amounts, and that, if the amounts were accurately stated, the accumulated unpaid preferential payable to the Interborough Company under the subway contract had been extinguished. This accumulated unpaid preferential was the source from which payments had been made out of subway income on the dividend rental on the assenting stock. The Manhattan Company had not participated in the settlement of these accounts by the City and the Interborough Company. The accountants of the Manhattan Company took up promptly the investigation of this settlement and the other matters bearing upon the question whether there were any net earnings under the Plan of Readjustment applicable to the assenting stock after July 1, 1928. After investigation of these items and numerous conferences with the officers and employees of the Interborough Company the accountant of the Manhattan Company filed a written report in April, 1932, in which he concluded that a substantial amount of net earnings under the Plan of Readjustment

applicable to the dividend rental on the assenting stock had not been so applied. The Board of Directors of the Manhattan Company at a meeting held on June 16, 1932, adopted a resolution in which they declared that they were dissatisfied with the accounting methods of the Interborough Company under the Plan of Readjustment for the period from July 1, 1928, and on June 22, 1932, notified the Interborough Company of such dissatisfaction, and requested that independent certified public accountants be called in, at the expense of the Interborough Company, to examine its accounts for the period from July 1, 1928, in accordance with the provision of the Plan of Readjustment.

Complainant alleges in the supplemental bill (paragraph 11) that the members of the Executive Committee of Manhattan Railway Company, so far as is known, have taken no steps whatever to protect the Manhattan Company from the default under its First Mortgage caused by the Interborough Company's failure to pay the taxes payable in May 1932 on the special franchise and real estate of the Manhattan Company.

Deponent denies this allegation and states the facts to be as follows:

The taxes referred to in the supplemental bill of complaint are the special franchise and real estate taxes payable on May 31, 1932. When deponent was first informed that these taxes had not been paid he immediately caused a meeting of the Board of Directors of the Manhattan Company to be called. The meeting was held on June 16, 1932, at which a resolution was adopted that Manhattan Railway Company promptly notify the Interborough Company, as lessee, in writing that the real estate and special franchise taxes had not been paid, and demand that the Interborough Company pay such taxes promptly in accordance with the covenants contained in the lease, or deposit the amount of such taxes with a bank or trust company as provided in the Plan of Read-

justment. Such written demand was served by the Manhattan Company on the Interborough Company on June 24, 1932.

Complainant further alleges in the supplemental bill (paragraph 11) that Manhattan stations and properties are dilapidated in appearance compared with stations and platforms and properties of the Interborough Company, and that there is a specific duty imposed upon the Interborough Company under the lease with the Manhattan Company to keep the properties in good condition and repair, that the officers and directors of the Manhattan Company have failed to compel Interborough Company to carry out these provisions of the lease.

As to this matter, deponent avers that in August, 1932, the Board of Directors of Manhattan Railway Company passed a resolution declaring that they were dissatisfied with the maintenance of the properties of the Manhattan Company and calling upon the Interborough Company to join in selecting engineers as provided in the Plan of Readjustment, to determine the amount by which the Interborough Company had failed to maintain the properties of the Manhattan Company. Written demand to this effect was served upon the Interborough Company on August 24, 1932.

Deponent had no knowledge or intimation that a receivership of the Interborough Company was contemplated until after the appointment of the Receivers therefor on August 26, 1932.

WILLIAM ROBERTS.

Sworn to before me, this
6th day of October, 1932.
DAVID M. KEEBLE
Notary Public
New York County Clerk's No. 417
New York Co. Register's No. 3K599
Commission expires March 30, 1933.
(SEAL)

Affidavit of William Roberts.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM ROBERTS, being duly sworn, deposes and says:

Deponent makes this additional affidavit in answer to certain statements made in a supplemental petition verified by complainant's counsel and first served in the Court Room on the argument of the order to show cause herein.

2026 *Affidavit of William Roberts.*

In this supplemental petition it is alleged, on information and belief, that deponent knew long in advance of the filing of the application for receivership of the Interborough Rapid Transit Company and the subsequent application for the receivership of Manhattan Railway Company that the same were brought about pursuant to an understanding or conspiracy of which deponent had knowledge.

Deponent denies the truth of these allegations and repeats the statement in his original affidavit, verified October 6, 1932, that he "had no knowledge or intimation that
2027 a receivership of the Interborough Company was contemplated until after the appointment of the Receivers therefor on August 26, 1932". Deponent knew of the maturities of Interborough obligations on September 1, 1932, but believed that arrangements would be made by Interborough Rapid Transit Company for taking care of these maturities. He had no information which would have led him to believe that a receivership was imminent or in contemplation. Deponent went to his summer home in Maine a few days prior to August 26th and was surprised to receive on that day a telegram from his New York office stating that Receivers for the Interborough Company had been appointed.

2028 In the said supplemental petition petitioner suggests as a reason for his alleged belief that deponent knew of the alleged conspiracy that deponent, in April, 1932, presented to Manhattan Railway Company a bill for $60,000 or thereabouts for professional services alleged to have been rendered to said company for a period of three years prior thereto, and that such payment was authorized, although it virtually exhausted the entire cash in the treasury of the company. Deponent denies the implications sought to be drawn from these transactions and states the facts to be as follows:

When deponent became President of the Manhattan Railway Company in 1923, it was arranged that his salary should be at the rate of only $6,000 a year, but it was further understood that deponent should be entitled to receive additional compensation for legal services rendered to the company. Deponent was then a member of the firm of Murray, Prentice & Aldrich, later Murray, Aldrich & Roberts, which firm was counsel to the Manhattan Railway Company, as explained in deponent's original affidavit. After deponent's withdrawal from said firm, the same arrangement continued as to him personally. Deponent had rendered extensive and valuable legal services to the company for a period of three years prior to 1932, including the preparation of briefs and argument in the Appellate Division on the appeal in the proceedings for acquisition by condemnation of the elevated railroad spur on East 42nd Street, the consideration of numerous complicated legal questions relating to the net earnings of the Interborough Company and of the Manhattan Leased Lines under the plan of readjustment, and the examination of numerous valuation reports and consideration of various plans relating to proposed unification of transit systems in New York City. Deponent did not render bills year by year for these services solely for reasons of personal convenience. On March 25, 1932, deponent requested one of the directors of the Manhattan Company to call a meeting of the Executive Committee at which the compensation for deponent's legal services could be discussed. Deponent suggested that a fair charge would be at the rate of $20,000 a year, which he believes and avers was no more than fair and reasonable compensation for the legal services rendered, but stated that it was his desire to make a charge which would be satisfactory to the other members of the Board, especially in view of the limited cash resources

of the Manhattan Company. A meeting of the Executive Committee was held on April 7th, deponent not being present thereat, at which the total charge of $60,000 was unanimously approved and authorized and payment was made shortly thereafter. It did not virtually exhaust the entire cash in the treasury of the company but there remained in the treasury the sum of approximately $50,000. There is not normally any large amount in the treasury of the Manhattan Company. Under the lease, the Interborough Company paid all expenses of operation of the leased lines and was further obligated to pay as part of the rent the interest on the bonds and certain dividends upon the stock of Manhattan Company, besides all taxes. The Manhattan Company received annually under the lease the sum of $50,000 to cover administration expenses and this was substantially its only general revenue. At the time of this payment deponent had no intimation that instructions had been issued by the firm of J. P. Morgan & Company that there should be no payment by the Interborough Company of the sum of $860,000 which would become due to the City of New York for real estate and franchise taxes on the Manhattan Railway Company in May, 1932, as alleged in said supplemental petition, if such be the fact, nor had he any intimation that the Interborough Company intended to default on any other of its obligations or would be unable to meet its obligations. The payment to deponent, made pursuant to the authorization of the Executive Committee of the Manhattan Company in April, 1932, was ratified at the meeting of the Board of Directors on June 16, 1932, deponent not being present at the time that the matter of his compensation was discussed and voted upon.

With respect to the other allegations in said supplemental petition, deponent never heard that any stockholder contemplated a suit against him for misfeasance

or malfeasance in office as therein alleged and repeats the denials contained in his original affidavit of the allegations to the general effect that he has failed in his duty to promote the interest and welfare of Manhattan Railway Company, and that he is in any way under the domination or control of interests representing Brooklyn-Manhattan Transit Company or Interborough Rapid Transit Company.

WILLIAM ROBERTS

Sworn to before me this
8th day of October, 1932.
JAMES D. McCAULEY,
JAMES D. McCAULEY, Notary Public
Queens Co. Clerk's No. 2548, Reg. No. 7579
Cert's filed N. Y. Co. Clk's No. 273, Reg. No. 3Mc179
Cert's filed Kings Co. Clk's No. 27, Reg. No. 3088
Cert's filed Bronx Co. Clk's No. 15, Reg. No. 42Mc33
Commission expires March 30th, 1933.

2038 **Affidavit of Charles Franklin.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

MANHATTAN RAILWAY COMPANY, subject to leave of court WILLIAM
2039 ROBERTS, as Temporary Receiver of Manhattan Railway Company, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E 71-153—1932.

2040 STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CHARLES FRANKLIN, being duly sworn, deposes and says:

I am the solicitor for the complainant herein.

I have been a stockholder of the defendant, Manhattan Railway Company, for the past twenty years, and am now the owner of three thousand shares of its stock. I have read the affidavit of Louis Boehm, annexed hereto.

I was likewise informed, through a third person, of the fact that a bill had been filed in the Barber case for

the appointment of a receiver of Manhattan. I received this information a day or two before the return day of the order to show cause. In view of my large stockholdings, and of the still larger interests that I represent, I appeared on the return day of the order to show cause. When we were ushered into Judge Manton's chambers, we were informed by Judge Manton that he had already signed an ex parte order permitting Manhattan to intervene in the American Brake Shoe case, and had already signed an ex parte order appointing William Roberts receiver of Manhattan. He handed us a law book which he said contained a case which authorized this procedure. Although the bill in the Barber case had been filed before the Manhattan intervention petition, Judge Manton did not even grant counsel an opportunity to be heard before granting ex parte Manhattan's application in the American Brake Shoe case, and appointing William Roberts as receiver.

I had nothing whatever to do with the preparation or filing of the bill in the Barber case. I did not know it had been filed until a couple of days before the order to show cause was returnable. I was not even acquainted with Lawrence Berenson until a few days before the return day of the motion. I am quite sure that I did not refer, in the conference before Judge Manton, to the Barber bill as "our" bill. As I am informed, what was said at this conference was not taken down by an official stenographer of this court, but by a private stenographer employed by one of the defendants in the American Brake Shoe case. I could not have referred to the Barber bill as "our" bill because, as a matter of fact, it was not "our" bill. I was not the solicitor for the complainant, and had nothing to do with its preparation. Said bill was in no way instigated by the so-called Amster Committee.

I have read the affidavit of William Roberts, submitted upon this motion. Without attempting to reply

thereto in detail, which I consider unnecessary, I would like to point out to the court merely that it was a notorious fact, known to every patron of the Elevated railroad system, that for the past ten years the property had been under maintained, and permitted to become dilapidated and antiquated. This had much to do with the falling off in traffic on these lines. According to Mr. Roberts' own affidavit, it was not until August, 1932, the same month in which the receivers of Interborough were appointed, that the Manhattan directors passed a resolution that they were dissatisfied with the maintenance of its proper-
2045 ties, and called upon the Interborough to join in selecting engineers to determine the amount by which the Interborough had failed to maintain Manhattan's properties. This demand was not served, according to his own affidavit, until August 24, 1932, the day before Judge Manton made the order designating himself to hear the application for the appointment of a receiver. This application was made upon elaborate printed papers, verified on August 25, 1932, and no doubt prepared some days in advance. It is perfectly apparent that this constituted merely a belated attempt by Mr. Roberts, and the other Manhattan directors, to save themselves against liability in a possible stockholders' suit for neglect of their duties
2046 as directors of Manhattan.

As I am informed by one of the directors of Manhattan, and verily believe, at a meeting of the Board of Directors of Manhattan, held in and about the month of April, 1932, it was stated that instructions had been issued by the bankers for Interborough that the real estate and franchise taxes of Manhattan, due on May 1, 1932, amounting to $860,000, should not be paid, although at the time the Interborough had in its treasury approximately $5,000,000, and was well able to pay the same. No action was taken by Mr. Roberts, according to his own affidavit, in connection with the payment of these taxes, except to make a demand on June 24, 1932, that

such taxes should be paid. There is no claim that any steps were taken by Mr. Roberts to compel this payment, as provided by the terms of the lease.

Although the modified guaranteed stockholders of Manhattan have received no dividends since July 1, 1928, according to Mr. Roberts' own affidavit, it was not until June 16, 1932, about four years later, that a resolution was passed by the Manhattan directors that they were dissatisfied with the accounting methods of the Interborough, and requesting that independent accountants be called in to examine its accounts, as provided by the lease.

I respectfully submit that Mr. Roberts, upon his own affidavit, has shown his complete and indefensible neglect of the interests of Manhattan, and its stockholders.

Just as Mr. Boehm assumed that Judge Manton had jurisdiction to appoint the Interborough receivers, so did I likewise make that assumption. It was not until after Judge Manton had, ex parte, signed the order for the appointment of Mr. Roberts as receiver in the American Brake Shoe case before he even heard counsel upon the application in the Barber case, that I began to look into the question of how this case happened to come on before Judge Manton, and then discovered the existence of the two orders now under attack.

(Signed) CHARLES FRANKLIN.

Sworn to before me this 8th day of October, 1932.

LLEWELLYN HERNLY
Notary Public, Queens County,
Queens Co. Clks. No. 2151, Queens Cty. Reg. No. 2117
N. Y. Cty. Clks. No. 672, N. Y. Cty. Reg. No. 4M387
Commission expires March 30, 1934.

Affidavit of Louis Boehm.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E 71-153-1932.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LOUIS BOEHM, being duly sworn, deposes and says:

I am of counsel for the complainant, and for the intervenor, LILLIAN BOEHM.

I have read the affidavit of J. Osgood Nichols, verified October 5th, 1932, submitted in opposition to this motion. I have also read the brief submitted in behalf of the de-

fendant, American Brake Shoe and Foundry Company. In view of the statements contained in Mr. Nichols' affidavit and the inferences sought to be drawn in the brief, I think it proper that I should state to the Court my connection with the subject matter of this litigation. For a number of years I have been an owner of securities of the Manhattan Railway Company, and for more than a year and a half last past, my wife, Lillian Boehm, and I, have been owners of the securities of the defendant Manhattan and the defendant Interborough, having a par value of $372,000. All of these securities were purchased at prices greatly exceeding their present market value, in some instances many times their present market value. With such a large investment, I was naturally very much concerned in the affairs and welfare of both of these companies.

While I was in the country on my vacation in the latter part of August, I read in the newspapers that, upon an ex parte application, and without notice to other security holders, Judge Manton, upon the claim of the American Brake Shoe and Foundry Company for $27,000., had appointed receivers of the Interborough Rapid Transit Company, owing to the alleged inability of the Company to secure extensions of time of payment of its notes due on September 1st, and October 1st, respectively. Incidentally, I might state that nobody had ever asked Mrs. Boehm or myself for an extension. Upon my return to the City, I learned from a third person that one, Harry Barber, acting through Lawrence Berenson, his attorney, had filed a bill of complaint in this Court, and had made application for the appointment of a receiver of the Manhattan Railway Company, returnable on September 6th, 1932. I received this information a few days before the return day of said motion. Up to that time, I had not been acquainted with Harry Barber or with Lawrence Berenson, and, so far as I can recall,

had never even heard of them. I appeared on the return day of said order to show cause for the purpose of protecting our very substantial investment in these companies. I am familiar, in a general way, with the affairs of these two rapid transit corporations, and had kept in fairly close touch with the negotiations in connection with the proposed transit unification in the City of New York, and had felt for some time that, in the course of these negotiations, the interests of both the Interborough and the Manhattan had been subordinated to the interests of the Brooklyn-Manhattan Transit Corporation, and that Mr. Gerhard M. Dahl, the Chairman of the Board of Brooklyn-Manhattan Transit Corporation, who was likewise the Chairman of the Board of the Interborough Rapid Transit Company had, in the course of those negotiations, sacrificed the interest of the Interborough and of Manhattan in an attempt to obtain unduly favorable terms for the Brooklyn-Manhattan Transit Corporation. I refer particularly to the failure of the transit unification negotiations which were then conducted between Mr. Samuel Untermeyer, as special counsel for the Transit Commission, and Mr. Dahl, after a price of approximately $500,000,000. had been agreed upon for the properties of the Interborough, Manhattan, and B. M. T., over a difference of approximately $8,000,000. or $10,000,000. of debts or obligations of the B. M. T., which Mr. Dahl insisted would have to be assumed by the City before any deal could be made. As the result of this demand, insignificant in comparison to the total amount involved, the negotiations fell through, and the market value of the securities of the Interborough and the Manhattan greatly depreciated. In view of this situation, I felt that the domination exercised by the B. M. T. interests over the Interborough and Manhattan properties was injurious to these properties, and contrary to the best interests of the security holders of Interborough and Manhattan. In ad-

dition to that, I had become well aware, as indeed it was a matter of common knowledge, that the interests of Manhattan had never been adequately protected by its Board of Directors; that, although the lease between Interborough and Manhattan provided that the railroad, stations, rolling stock, and equipment should be maintained by the Interborough in first-class condition, the same had been allowed to deteriorate and become antiquated, that its stations were unsightly and smelly, that its cars were out of date and inadequate, and that the property of Manhattan had not been maintained as provided by the terms of the lease. I was also aware that no account had ever been given by Interborough to Manhattan stockholders showing the earnings of the Manhattan property, separate and apart from the unprofitable extensions which the Interborough had added on to their lines. In the Interborough reports the earnings are given merely of the "Elevated Division", and included, not only the lines of Manhattan, but also such unprofitable extensions; this, in spite of the fact that the lease provided that Manhattan could hire independent auditors at the expense of Interborough to examine Interborough's accounts. Under those conditions, I felt impelled to attend on the return day of the Barber order to show cause, in an effort to have independent receivers appointed for Manhattan who would vigilantly protect its interests and not neglect them, or permit them to be subordinated to those of Interborough or B. M. T. I assumed, of course, that Judge Manton had jurisdiction of the case, and never dreamed that he would undertake to appoint receivers of a vast property like the Interborough unless he had jurisdiction to do so. When we were ushered into Judge Manton's Chambers, Judge Manton informed us that he had signed an ex parte order permitting the Manhattan Railway Company to intervene in the American Brake Shoe case against the Interborough, and that he had likewise just

signed, ex parte, an order appointing William Roberts, the President, director and counsel for Manhattan, as Receiver. I thereupon objected to the appointment of Mr. Roberts who, as President, director and counsel of the Company, was perhaps chiefly responsible for the failure of the Company to protect its interests, to have the Interborough keep up and maintain its properties, and for the failure of Manhattan to be in any way represented in the transit unification negotiations. Mr. Roberts, however, had already been appointed before Judge Manton had even heard counsel in the Barber case upon the motion for appointment of a receiver, and, so far as I know, without consultation with any of the security holders of Manhattan. Under the circumstances, my protest against the appointment of Mr. Roberts, which had already been made, was perfectly futile, and of no avail.

Thereafter, I consulted with Mr. Franklin, as the counsel for very large interests in the Manhattan Company, as to how we could protect our respective interests, and we thereupon, for the first time, made an examination into the question as to how Judge Manton came to be sitting in this case, and as to whether or not he had jurisdiction of the case at all. As a result of that examination, we discovered the existence of the two orders which Judge Manton had made on August 25th, 1932, in the first of which he designated himself to hold a term of the District Court, and in the second of which (filed August 26th, 1932), he stated his disagreement with the District Judges as to the division of business. We thereupon examined the Rules of this Court, and discovered that said orders, in our opinion, were in violation of Rules 1a and 11a of the General Rules of this Court. Mr. Franklin and I thereupon concluded that Judge Manton had no jurisdiction of the American Brake Shoe case, and no right to appoint receivers therein, and that

his action in so doing was void. Thereupon, Mr. Franklin commenced the Johnson action, in which I appear as counsel, for the purpose of obtaining a judicial determination of Judge Manton's lack of jurisdiction. Lillian Boehm, as a bondholder of Interborough, has intervened in that action and filed a supplemental bill praying that Judge Manton's order appointing receivers of the Interborough be vacated for lack of jurisdiction.

After the commencement of the Johnson action, of course, neither Mr. Franklin nor I took any further part in the proceedings had before Judge Manton in connection with the Interborough or Manhattan receiverships. Our position was that Judge Manton had no jurisdiction of the case, and that any orders that he might make would be null and void. To have appeared before him and argued on the merits of these applications, would have been entirely inconsistent, and would have made our position untenable.

In connection with the claim that Mr. Franklin, at the conference before Judge Manton, referred to the Barber bill as "our" bill, I desire to stae that I was present throughout this conference, and, to the best of my recollection, Mr. Franklin in the course of that conference never referred to the Barber bill as "our" bill. My recollection is corroborated by a stenographic transcript of a lengthy discussion that occurred between Mr. Arthur Berenson, a stockholder of Manhattan, and Judge Manton, which covered six pages of the transcript. This discussion was entirely between Judge Manton and Mr. Arthur Berenson. In the middle of that discecussion, Mr. Arthur Berenson made the following statements, erroneously imputed, in the transcript, to Mr. Franklin:

> "It is a thing that alarmed us very much, and caused our bill to be filed. We could not come in here as intervenors because we represented only stockholders, and we think under the principles

068 *Affidavit of Louis Boehm.*

laid down in the famous case of Harkin against Brundage where receivers are asked for in behalf of a petitioner in one court and an application made there that if the receivers should be appointed they should be appointed on the petition which comes before the Court first. If this bill had been filed in the state court, for example, and a petition for the appointment of a receiver."

I particularly recall that it was Mr. Berenson who made this statement because it was he who referred to the famous case of Harkin *v.* Brundage, and not Mr. Frank-
069 lin.

LOUIS BOEHM

Sworn to before me this)
8th day of October, 1932.(
MAY HERSHEY Notary Public
Bronx Co. Cl'k No. 201 Reg. No. 228H33
N. Y. Co. Cl'k No. 1145 Reg. No. 3H737
Kings Co. Cl'k No. 116 Reg. No. 3381
Commission expires March 30, 1933

070

Stipulation Extending Interborough Receivers' Time to Answer.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the time of Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company to appear specially to contest the jurisdiction of this Court, or to answer, plead, or otherwise move with reference to

2074 *Stipulation Extending Interborough Receivers' Time to Answer.*

the complaint herein, be and the same is hereby extended to and including the 18th day of October, 1932.

Dated, New York, N. Y., October 10, 1932.

CHARLES FRANKLIN,
Attorney for Complainant.

CHADBOURNE, STANCHFIELD & LEVY,
Attorneys for Victor J. Dowling
and Thomas E. Murray, Jr., ap-
2075 pearing specially and without
submitting to the jurisdiction of
this Court in this cause.

So Ordered 10/11/32.

WOOLSEY
U. S. D. J.

2076

Stipulation Extending Manhattan Receiver's Time to Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, Complainant, *against* MANHATTAN RAILWAY COMPANY, subject to leave of court WILLIAM ROBERTS as Temporary Receiver of MANHATTAN RAILWAY COMPANY, *et al.*, Defendants.	IN EQUITY E-71-153

It is hereby stipulated that the time of the defendant, WILLIAM ROBERTS, as temporary receiver of Manhattan Railway Company, to appear, answer or otherwise move to the bill of complaint herein, be and the same hereby is extended to and including October 18, 1932.

Dated: New York, October 10, 1932.

CHARLES FRANKLIN
Solicitor for complainant.
per L. W. S.

C. W. So ordered. October 11, 1932.
WOOLSEY,
U. S. D. J.

(Rubber stamp on reverse)
UNITED STATES DISTRICT COURT
Filed October 13, 1932.
S. D. of N. Y.

2080

Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, Complainant, *v.* MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of 2081 MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Defendants.	IN EQUITY No. 71-153.

2082 On three orders to show cause, which are brought by the complainant, and an intervening petitioner in the above entitled cause—Equity 71-153—in which all the parties to Equity cause No. 70-364—*The American Brake Shoe and Foundry Company* v. *Interborough Rapid Transit Company, Manhattan Railway Company*, Intervenor,—together with the receivers appointed in that cause, are made parties defendant, with leave of this court as to said receivers, asking relief which may be thus conveniently summarized:

1. To have vacated and set aside as void two orders dated August 25, 1932, made by Judge Manton, Senior Circuit Judge of this Circuit, the first of which desig-

nated himself to hold a District Court in this District for the purpose of hearing applications and proceedings in the cause of the *American Brake Shoe and Foundry Company* vs. *Interborough Rapid Transit Company*, which later, after it was filed in this Court on August 26, 1932, was given Equity number 70-364 on the Equity Docket; and by the second of which Judge Manton purported to make a change in the division of the business in the District Court and to appoint himself, in addition to the motion judge, to hear application for the appointment of receivers in equity causes in the motion part wherein only such applications can be made under Rule 11-a of the General Rules of this Court.

2. To vacate and set aside as void orders subsequently made by Judge Manton in this Court by which he appointed receivers and counsel for the Interborough Rapid Transit Company and the Manhattan Railway Company.

3. To have new receivers appointed by this Court both for the Interborough Rapid Transit Company and the Manhattan Railway Company.

4. To have the orders to show cause heard by the eight District Judges of the Southern District of New York sitting *en banc*.

5. And such other and further relief as might seem just and proper to this Court.

CHARLES FRANKLIN, ESQ., solicitor for complainant
LOUIS BOEHM, ESQ., solicitor and counsel for Lillian Boehm, intervenor
LLOYD PAUL STRYKER, ESQ., solicitor and counsel for holders of the Ten-year 6% Gold Notes Committee of Interborough Rapid Transit Company
MESSRS. BREED, ABBOTT & MORGAN, solicitors for The American Brake Shoe and Foundry Company, complainant—Charles H. Tuttle, Esq., W. K. Pettigrue, Esq. and Paris S. Russell, Esq., of counsel

MESSRS. HUGHES, SCHURMAN & DWIGHT, solicitors for William Roberts, Receiver of the Manhattan Railway Company—Charles E. Hughes, Jr., Esq. and Allen S. Hubbard, Esq., of counsel

MESSRS. CHADBOURNE, STANCHFIELD & LEVY, solicitors for the Receivers of the Interborough Rapid Transit Company, (Messrs. Dowling and Murray)—William D. Guthrie, Esq., William Wallace, Esq., of counsel

JAMES L. QUACKENBUSH, ESQ., solicitor for the Interborough Rapid Transit Company

ARTHUR J. W. HILLY, ESQ., Corporation Counsel of the City of New York—F. E. Garstarphen, Esq., Edgar J. Kohler, Esq. and Harry Hertzoff, Esq., of counsel

MESSRS. COTTON, FRANKLIN, WRIGHT & GORDON, solicitors for Protective Committee of Manhattan Consolidated 4's—Clifton Murphy, Esq. and B. C. Wright, Esq., of counsel

LAWRENCE BERENSON, ESQ., solicitor for complainant in an action entitled Barber *v.* Manhattan Elevated R. R. Co., the Interborough Rapid Transit Company and the Receivers of the Interborough Rapid Transit Company

MESSRS. DILLS, MUECKE & SHOLKER, solicitors for Manhattan Railway Company—Jack J. Lawrence, Esq., of counsel

ELON S. HOBBS, ESQ., solicitor for Independent Security Holders who have not filed their securities with the Protective Committee, but have filed a petition

LOUIS B. WHELE, ESQ., solicitor for the Guaranteed Stockholders Committee — Norman Johnson, Esq., of counsel

MESSRS. DAVIS, POLK, WARDWELL, GARDINER & REED, solicitors for the 7% Noteholders' Committee and 5% Bondholders' Committee, both Committees of Interborough Rapid Transit Company securities—Edwin S. S. Sunderland, Esq., of counsel

JOHN J. CURTIN, ESQ., appearing specially for the Transit Commission—George H. Stover, Esq., of counsel

MESSRS. DAVIES, AUERBACH & CORNELL, solicitors for Central Hanover Bank & Trust Company—Harold C. McCollom, Esq., of counsel

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The following members of the Bar appeared on the argument of these motions and submitted oral arguments or briefs therein:

CHARLES FRANKLIN, ESQ. and LOUIS BOEHM, ESQ., on behalf of the complainant in Equity 71-153, and Lillian Boehm, intervenor therein, of counsel in behalf of such intervenor

WILLIAM D. GUTHRIE, ESQ., WILLIAM WALLACE, ESQ., of counsel for the Receivers of the Interborough Rapid Transit Company

CHARLES E. HUGHES, JR., ESQ. and ALLEN S. HUBBARD, ESQ., of counsel for William Roberts, Esq., receiver of the Manhattan Railway Company

CHARLES H. TUTTLE, ESQ., WILLIAM K. PETTIGRUE, ESQ. and PARIS S. RUSSELL, ESQ., of counsel for the American Brake Shoe and Foundry Company, complainant in Equity 70-364

LLOYD P. STRYKER, ESQ., of counsel for a Committee of Noteholders of the Ten-Year 6% Gold Notes of the Interborough Rapid Transit Company

ELON S. HOBBS, ESQ., pro se and representing independent holders of securities

EDWIN S. S. SUNDERLAND, ESQ., of counsel for Seven Per Cent Noteholders Committee and 5% Bondholders Securities

HAROLD C. MCCOLLOM, ESQ., of counsel for the Central Hanover Bank & Trust Company

WOOLSEY, J.:

These motions are granted to the extent here indicated:

A. (1) The counsel for the moving parties may present to me for signature an order providing for the consolidation of the cause of *American Brake Shoe and*

Foundry Company v. *Interborough Rapid Transit Company, Manhattan Railway Company, Intervenor,*—Equity No. 70-364—with this cause of *Johnson* v. *Manhattan Railway Company,*—Equity No. 71-153.

(2) After the order of consolidation thus granted is signed and filed, counsel for the moving parties may present to me for signature a further order providing that all the orders made by Judge Manton in this Court, in the cause of *American Brake Shoe and Foundry Company* v. *Interborough Rapid Transit Company, Manhattan Railway Company, Intervenor,*—Equity No. 70-364—dealing both with the Interborough Rapid Transit Company and the Manhattan Railway Company, be vacated and set aside as wholly void and of no juridical effect.

The order which I am asked to sign must, however, contain a provision that its operation is suspended for a period of twenty days to enable the defendants herein to appeal from this decision if they are so advised.

B. (1) I deny the motions, without prejudice, in so far as they request the appointment of new receivers at the present time; but if no appeal is taken within twenty days, or, if, after the decision in such appeal as may be taken within that time, my decision is affirmed, a new application for such appointment may be made, in pursuance of General Rule 11-a of this Court, to the Judge at that time assigned to hold the Bankruptcy and Motion part of the business of this Court.

(2) I deny, for want of jurisdiction, these motions in so far as they request me to vacate the orders made and signed on August 25, 1932, by Judge Manton as Senior Circuit Judge, because I can only deal with the effect of these orders in this Court. This I have hereinafter done.

(3) I have already denied the application of the petitioners to have these motions heard by the eight Judges of the District Court sitting *en banc.*

I. This proceeding involves important questions of Federal Court administration which are, I believe, of first impression. The validity and effect of Orders of Designation and Division of Business made by Honorable Martin T. Manton, as the Senior Circuit Judge of the Circuit Court of Appeals for this Circuit, are challenged by the plaintiffs.

It may be appropriate,—although it should be unnecessary—to remark *in limine* that the situation out of which this challenge arises was not created or contributed to in any way by the United States District Court for the Southern District of New York or by any Judge thereof.

II. As a preface to the statement of the facts I think it would be helpful to express my views as to the relation between the Circuit Court of Appeals and the District Court under the Judicial Code now contained in Title 28 of the United States Code, for that will give a background against which the facts must be seen and the appropriateness of the relief sought by the complainant determined.

Section 18 of the Judicial Code (Title 28, United States Code, Section 22) provides under the heading "*Circuit Judge designated to hold District Court—Powers*", *inter alia:*

> "The Chief Justice of the United States or the Circuit Justice of any Judicial Circuit or the Senior Circuit Judge thereof, may, if the public interest requires, designate and assign any Circuit Judge of a Judicial Circuit to hold a District Court within such circuit."

Section 118 of the Judicial Code (Title 28, United States Code, Section 213) deals with Circuit Judges, and, after prescribing their number in each circuit and their appellate duties, provides, *inter alia:*

98

> "Nothing in this section shall be construed to prevent any Circuit Judge holding District Court or otherwise, as provided by other sections of the Judicial Code."

Section 120 of the Judicial Code (Title 28, United States Code, Section 216) deals with the judges who may sit in the Circuit Court of Appeals and provides that the District Judges may sit in that Court when enough Appellate Judges are not available.

In addition to the provisions cited, there are also
99 the provisions contained in Title 28, United States Code, Section 47, and in Title 28, United States Code, Section 380, involving, respectively, suits challenging orders of the Interstate Commerce Commission and suits in which it is alleged that a State statute is unconstitutional and providing for the convening of a three judge court, containing at least one Circuit Judge, to hear such causes.

It is observable, however, by reading the provisions of Title 28, United States Code—Judicial Code and Judiciary—that, although by the provisions above mentioned, the organization of the Federal Courts is made very plastic, so far as the use of their judicial personnel is concerned, the District Courts and the Circuit Courts
100 of Appeals are distinct Courts; that the former are the only instance Courts, and that the latter have appellate jurisdiction only.

Each Court has, of course, its own intra-mutal administrative problems arising in connection with the arrangement and despatch of the business which comes before it. When the District Court is functioning within its lawful ambit, these problems constitute what I may, perhaps, properly call its domestic economy, and are solely its own concern.

Control over its business is an inherent right of any body of judges which constitutes a Court. If those Judges are going to function at their best, they must,

within the law, be masters in their own house; for the wisest outsider, it may safely be assumed, cannot possibly be so aware of the problems which face them as are the judges who are carrying the heavy responsibility of doing the Court's business from day to day.

This obvious fact is explicitly recognized by Title 28, United States Code, Section 731, which gives the District Court power to make rules of practice, and implicitly recognized also, by Section 23, of the Judicial Code, Title 28, United States Code, Section 27, which provides that in districts having more than one District Judge, the District Judges may agree on the division of business for the District, and allows the intervention of the Senior Circuit Judge only when the several District Judges in the District are unable to agree on the division of business therein. In such event, the aid of the Senior Circuit Judge is invoked under Section 23 of the Judicial Code, as an outsider, who by statute may be called on by the District Court as a peacemaker between its Judges.

III. The facts, so far as they are relevant in connection with these proceedings, are as follows:

On June 29, 1932, a schedule entitled—

> "Assignment of judges and division of work of the United States District Court for the Southern District of New York for the months of July, August and September, 1932,"

signed by all the eight judges of the District Court, was filed in the Clerk's office thereof.

At the same time, on the same date, a schedule entitled—

> "Assignment of United States District Judges S. D. of N. Y. October 1932 to June 1933,"

showing the division of work in this Court for the Court year which was just begun. This also was signed by all the District Judges.

On June 30, 1932, the General Rules of this Court were revised by the addition thereto of two rules called Rule 1-a and Rule 11-a; and an appropriate order making the revision was entered in the Clerk's office on said date providing that the new rules should become effective on July 1, 1932. This order was signed by all the eight District Judges.

These rules were as follows:

> "1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the Senior District Judge."
>
> "11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the bankruptcy rules), shall be made to the judge assigned to hold the bankruptcy and motion part of the business of the court and to no other judge."

By the assignment of the summer business, Judge Patterson was assigned to deal with bankruptcy and general motions between August 15, 1932 and August 29, 1932, inclusive.

On August 25th and August 26th, 1932, when the first receivership order was signed by Judge Manton, Judge Patterson was in Court or in his Chambers throughout the day ready to receive any applications for equity receiverships which might be made and functioning in all respects as a *de jure* judge in the part to which he was assigned.

On August 25th, Judge Manton in his capacity as Senior Circuit Judge of the Second Circuit signed two orders.

The first of these orders, for convenience herein referred to as the "Designation Order", reads in full as follows:

"WHEREAS, the undersigned as Senior Circuit Judge of the Second Judicial Circuit of the United States, is empowered and authorized by law, pursuant to the provisions of Title 28, Sec. 22 of the Code of Laws of the United States of America, if the public interest so requires, to designate and assign any Circuit Judge of the Second Judicial Circuit to hold a District Court within such Circuit; and

WHEREAS, the undersigned, as such Senior Circuit Judge, finds that the public interest requires that Martin T. Manton, a Circuit Judge of the Second Judicial Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a District Court within such Circuit, it is hereby

ORDERED, ADJUDGED AND DECREED, that the said Martin T. Manton be and he hereby is designated and assigned to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the matter entitled American Brake Shoe & Foundry Co. *vs.* Interborough Rapid Transit Company, and for such further time as may be required to complete unfinished business.

Dated; New York, August 25, 1932.

MARTIN T. MANTON
Senior Circuit Judge for the
Second Judicial Circuit."

The second of these orders, for convenience herein referred to as the "Division of Business Order," reads as follows:

Opinion.

"IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND JUDICIAL CIRCUIT.

IN THE MATTER *of* the Division of Business and Assignment of Cases for Trial in the Southern District of New York.	ORDER.

WHEREAS, Martin T. Manton has been duly designated and assigned to hold a District Court of the United States for the Southern District of New York within this Second Judicial Circuit for a period of thirty days from this day; and

WHEREAS, Section 23 of the Judicial Code (Mar. 3, 1919, c. 231, Sec. 23, 36 Stat. 1090) provides that 'In Districts having more than one district judge, the judges may agree upon a division of business and assignment of cases for trial in said district; but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the district lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District'; and

WHEREAS, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business and assignment of cases for trial in the Southern District of New York as provided in and pursuant to the rules of court for the Southern District of

New York heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby

ORDERED, ADJUDGED AND DECREED that, for a period of thirty days beginning with this day, all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the district judge designated to hear such applications pursuant to Rule 11-a of the General Rules of the District Court for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York.

Dated, New York, August 25th, 1932.

MARTIN T. MANTON".

These orders were both filed in the District Court on August 26, 1932.

On August 26, 1932, a bill of complaint brought by the American Brake Shoe and Foundry Company, as a creditor against the Interborough Rapid Transit Company as defendant and asking for a receivership in equity on the ground that it was at the time in such a condition that it could not discharge its then existing or impending obligations and needed the protection of the Court.

On the same day the defendant filed an answer admitting all the allegations of the complaint and consenting to and joining in the request for the appointment of a receiver.

I am told by Judge Knox, who was here at the time, that Judge Manton did not apply to him under General Rule 1-a for an assignment, either on August 25th or August 26th. I am told by Judge Patterson that there was not any application made to him for a receivership order in the cause of *American Brake Shoe and Foundry Company* v. *The Interborough Rapid Transit Company,*

Equity No. 70-364, at any time on August 25th or August 26th.

On August 26th, Judge Manton made and signed an order appointing Victor J. Dowling, Esq. and Thomas E. Murray, Jr., Esq., temporary receivers of the Interborough Rapid Transit Company, and provided therein that all interested parties should, on September 22, 1932, show cause why the receivership should not be continued *pendente lite.*

On August 26th, 1932, an order was made by Judge Manton appointing Messrs. Chadbourne, Stanchfield &
117 Levy attorneys for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of the Interborough Rapid Transit Company.

On September 6, 1932, on petition of the Manhattan Railway Company, verified the second day of September, 1932, for an extension of the receivership to it, Judge Manton made an order appointing William Roberts, Esq. temporary receiver of the Manhattan Railway Company, with a provision for interested parties to show cause on September 22nd why the receivership should not be continued.

On September 7, 1932, an order was made by Judge Manton appointing Messrs. Hughes, Schurman & Dwight
118 attorneys for William Roberts, Receiver of the Manhattan Railway Company.

On September 22nd there was a hearing before Judge Manton under the show cause provision of the receivership orders.

On September 29th an order was filed, which Judge Manton had made on September 28th, continuing the receiverships *pendente lite*, and providing that the 1932 equity term of this Court be extended until the termination of the proceedings under the receiverships; or, in any event, for a period of three years from September 28, 1932, with leave to apply for further extension there-

of, and with reservation of full jurisdiction in the premises.

Turning now to the Johnson case, Equity No. 71-153, the relevant chronology therein is as follows:

On September 21, 1932, Benjamin F. Johnson, a citizen and resident of the State of Kentucky, filed a bill of complaint herein as a stockholder owning 100 shares of the Manhattan Railway Company of the par value of $10,000. It prayed substantially the same relief asked for in the orders to show cause now before me, and, in addition, that there should be an accounting by the Interborough to the Manhattan Railway Company for all sums due and owing to it.

On the same day an order was made by Judge Caffey allowing Lillian Boehm to intervene as a party plaintiff therein.

The said intervenor alleges that she is the owner of 1400 shares of the capital stock of the Manhattan Railway Company, having a par value of $140,000, and $117,000 par value of First Mortgage 4% bonds of the defendant Manhattan Railway Company,—which securities she has owned for more than a year last past—and also is the owner of $60,000 of First and Refunding 5% Bonds of the Interborough Rapid Transit and $35,000 of its Seven Per Cent Notes.

The first of the orders to show cause before me was granted by Judge Caffey on September 21st, the second was granted by Judge Bondy on October 1st, and the last by me on October 3rd.

All these orders were returnable on the general motion calendar on October 4, 1932, and on that day, the prayer which was contained in all three of these orders to show cause to the effect that the District Court should sit *en banc* to hear these motions was argued and denied by me.

IV. In my enumeration of the various steps taken in this proceeding, I did not mention the fact that on March 20, 1930, Judge Manton as Senior Circuit Judge made and filed an order in this Court which reads as follows:

> "UNITED STATES DISTRICT COURT
> SOUTHERN DISTRICT OF NEW YORK
>
> In order to meet the requirements of the public interest and under the authority conferred by Section 22 of Title 28 of the Code of Laws of the United States, I hereby designate and appoint United States Circuit Judge Martin T. Manton of the Second Circuit to hold at any time a session or sessions of the District Court for the Southern District of New York, for the trial of causes and the hearing and disposition of motions, petitions for naturalization, and such ex parte and other business as may come before me.
>
> Dated, March 20, 1930.
>
> MARTIN T. MANTON
> Senior Circuit Judge of
> the Second Circuit."

The reason why this order was not mentioned in the statement of facts is that it seems to be the settled law that such designation did not make Judge Manton a District Judge. It only gave him authority as Circuit Judge to hold a District Court of the United States. *Craig* v. *Hecht*, 263 U. S. 255, 274. Consequently, it cannot be successfully argued that under that order he was given such a status in the District Court as to give him a right to participate in the division of business of the District Court, or in its rule making.

I think that such a general blanket order of designation is merely an order to provide against possible unexpected emergencies, and it is not in any way involved either directly or indirectly in the present situation. I come to that conclusion not only because, commencing

with Judge Lacombe, such blanket orders have been entered by every Senior Circuit Judge, but also because of the fact that Judge Manton did not purport to act under that order, but, as Senior Circuit Judge, he made two special orders on August 25th, designating himself to hold a District Court in the Southern District of New York beginning August 25th to hear applications in the American Brake Shoe & Foundry case, and declaring, after such a designation, that there was a disagreement between him and the District Judges as to the division of business and that under Section 23 of the Judicial Code he as Senior Circuit Judge solved this disagreement by assigning himself to sit with them as a motion judge.

This I hold was a construction by Judge Manton himself, that the order of March 20, 1930, was merely a blanket order, and that General Rules 1-a and 11-a of the District Court, duly passed on June 30, 1932 and effective July 1, 1932, prevented him from operating under the blanket order after that date.

V. It has been contended that the Johnson bill was not a valid stockholder's bill for a receivership in equity on the ground that it failed to allege in compliance with Equity Rule 27 of the Supreme Court that the plaintiff was a stockholder at the time of the transactions of which he complains. This objection is met by the allegations of Paragraph Four of the complaint.

Further objection is made that the bill fails to set forth the complainant's effort to secure relief through the corporate directors. This is adequately met by the allegations of Paragraphs 24-a and 24-b of the complaint which shows that by reason of the interlocking directorate of the Manhattan Railway Company and the Interborough Rapid Transit Company, a request for action by the directors would have been futile.

It must be observed also that according to the allegations of the bill the Manhattan Railway Company is with-

out any operating personnel and is entirely in the hands of the management of the Interborough.

The bill asks, accordingly, as further relief, for an accounting to the Manhattan Railway Company by the Interborough Rapid Transit Company.

By the intervention as plaintiff of Lillian Boehm, a secured creditor owning secured notes of the Interborough, and First Mortgage bonds constituting a first lien upon the property of the Interborough, there is a sufficient basis in the prayer of the Johnson bill for the appointment of receivers, not only of the Manhattan Railway Company but also of the Interborough Rapid Transit Company.

In my opinion the bill of complaint is not demurrable, but, on the contrary, sets forth good grounds in equity for the relief it asks. That is sufficient for the purpose of the plaintiffs' present motions.

VI. I now have to deal with the *locus standi* of the plaintiffs to ask for the relief sought in their orders to show cause in a proceeding different from that in which the receivers were appointed.

It is earnestly contended by the plaintiff and intervenor in the Johnson case that it cannot properly be claimed that the attack they are making on the orders made by Judge Manton in the *American Brake Shoe & Foundry Company* case is a collateral attack. Indeed, it seems to me that there is a great deal to be said for their contention; for the challenge to the receivers sounds in *quo warranto*.

But each cause is, of course, separate from any other cause and is conducted through its own appropriate procedural course to its appropriate judgment or decree, and there is in my mind a residuum of doubt whether, so long as they remain separate causes, an order could properly be made in the *Johnson* case, Equity No. 71-153, which would affect the receivership orders and the other orders

made in the *American Brake Shoe & Foundry Company* case, Equity No. 70-364.

It seems to be very easy, however, to avoid any such possible procedural difficulty; for it often happens that two cases are so related as to make it appropriate that, as a matter of wise administration, they be consolidated.

If ever there was an instance where an order of consolidation would be appropriate, it seems to me that I have it before me here, for in the *Johnson* case, Equity No. 71-153, the defendants named are the parties in the *American Brake Shoe & Foundry Company* case, Equity No. 70-364, and the receivers who were appointed therein. All these parties have been heard by me on this proceeding and it is clear that there should be a consolidation of the two causes, Equity No. 70-364 and Equity No. 71-153. Both causes are in this Court and I have both the power and the right to make such an order.

Furthermore, such a consolidation by an order of the Court on its own initiative is not an intervention by the complainants herein, Mr. Johnson and Mrs. Boehm, which would require them to subordinate themselves to the procedural situation existing in the *American Brake Shoe & Foundry* case, but they will still remain at large to challenge the jurisdiction of Judge Manton to make orders in that case.

Accordingly, the solicitors for the complainants in the *Johnson* case may present to me an order providing for the consolidation of the *American Brake Shoe and Foundry* case, Equity No. 70-364, with the *Johnson* case, Equity No. 71-153.

VII. I turn now to the merits of the questions involved.

1. The only question which can properly be dealt with by me is whether Judge Manton had any jurisdiction whatever to appoint the receivers under the orders above mentioned.

Opinion.

There is not any question but that this Court had jurisdiction in Equity No. 70-364 of the subject matter of the litigation, for the necessary diversity of citizenship exists and the amount involved is far more than that required by the statute.

Furthermore, there is not any question but that this Court had personal jurisdiction of the parties in Equity No. 70-364. The Interborough Rapid Transit Company appeared generally and joined in the complainant's prayer for the appointment of a receiver and the Manhattan Railway Company intervened in the proceeding and prayed for the extension of the receivership to it.

Thus far the usual questions of jurisdiction were solved by the parties unaided, and the cause became effective as a basis for judicial action by this Court when the papers were filed in the office of the Clerk thereof.

When we come, however, to the making of the receivership orders there is another and a very unusual question of jurisdiction involved; that is, whether the exercise of the jurisdiction came within the judicial competence of the judge who purported to exercise it.

For, obviously, the judicial function in any case can only be effectively exercised by a Judge whose status in the court in which he acts is either that of a Judge *de jure*, or, at least, of a Judge *de facto*. It will not suffice if the Judge who purports to act as such is a mere usurper of judicial power.

Into which category did Judge Manton's status fall?

2. The rule making power of the District Courts is vested in them by Section 731 of Title 28 of the United States Code (R. S., Sec. 918) which reads as follows:

> "Sec. 731. *Rules of practice in District Courts* —The district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under Section 730 of this title,

make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

It was under the power thus vested in it that the District Court for the Southern District of New York made and promulgated General Rules 1-a and 11-a. I hold that these rules were not in any way inconsistent with any law of the United States or with any rule of the Supreme Court and that, consequently, they were valid rules and as such had the juridical status of statutes. Cf. *Weil* v. *Neary*, 278 U. S. 160, 169, 170; *Galveston Drydock & Construction Company* v. *Standard Dredging Company*, 40 F. (2d) 442, 444.

It is urged on me that Rule 1-a is a limitation on the power given to the Senior Circuit Judge under Section 18 of the Judicial Code, Title 28, United States Code, Section 22, to make designations of Circuit Judges to hold a District Court, and, hence, is inconsistent with a law of the United States.

I do not agree.

Section 18 empowers a Senior Circuit Judge to designate a Circuit Judge to hold a District Court, but it does not empower him to designate the case which the Circuit Judge is to hear or the part in which he is to sit.

It is urged on me that General Rule 11-a is an equity rule. It is said that Rule 4 of the Equity Rules of this Court, which provides that the Judge who appoints a receiver in a cause shall thereafter hear all matters in that case, is in *pari materia* with General Rule 11-a, that, consequently, General Rule 11-a must be an equity rule, and that as General Rule 11-a has not had the concurrence of a majority of the Circuit Judges of this Circuit, as

required for Equity Rules of the District Court by the Supreme Court Equity Rule 79, it is invalid.

I do not agree that General Rule 11-a is an equity rule, and, consequently, I hold that the fact that it has not had the concurrence of a majority of the Circuit Judges does not affect its validity.

Rule 11-a merely tells where attorneys have to go to get a receiver appointed, and it does not deal with any practice of any kind in equity. It simply points to the door of the room where applications for receiverships must be made. Practice in equity in receivership cases only commences after the making of the order of appointment, which, in consent cases, is analogous to the issuance of process, for then only does an equity receivership based on consent begin.

3. It should also be observed here that the validity of rules of a District Court cannot be determined by the administrative orders of a Senior Circuit Judge. Their validity can only be tested judicially in a proper case, and unless so tested and invalidated they are binding on all who do business in the Court which made them.

4. Judge Manton's Designation Order of August 25, 1932, which was aimed at Rule 1-a, was, I hold, entirely ineffectual to suspend or otherwise affect that rule. First, it was an improper procedure for the purpose as has just been stated, and, second, in the order itself Judge Manton exceeded his statutory authority when he named himself to deal with the American Brake Shoe and Foundry case in the District Court. For Section 18 of the Judicial Code, under which he purported to act, does not provide for any such selective designation or any such focussing of judicial activity in the District Court.

5. Judge Manton's second order of August 25, 1932, which I have called the Division of Business order, involved an attempt to get around General Rule 11-a which

requires all applications for receiverships in equity cases to be made only to the Judge assigned to hold the Bankruptcy and motion part of the business of the Court and to no other Judge.

After Judge Manton had designated himself to hold a District Court for a particular purpose by his first order, he reported to himself, according to his second order, that he found himself in disagreement with the District Judges in this District and, invoking Section 23 of the Judicial Code,—Title 28 United States Code, Section 27,—he made an order for the Division of Business whereby he designated himself to sit with the regular motion Judge and provided that all applications for the appointment of receivers in equity might, for the period of thirty days, be made to him as well as to the regular motion Judge.

On August 26, 1932, these administrative orders of August 25th were filed in the District Court bound together under one cover, and on the same day the order appointing receivers for the Interborough was made.

Section 23 of the Judicial Code, Title 28 United States Code, Section 27, which was invoked to support the Division of Business order, reads as follows:

> "*Districts with more than one judge; division of business.*
>
> "In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but *in case they do not agree*, the senior circuit judge of the circuit in which the district lies, shall make all *necessary* orders for the division of business and the assignment of cases for trial in said district."

The only reported case which I have been able to find, dealing in detail with the operation of the provisions of this Section of the Judicial Code is *Case* v. *United States*.

14 F. (2d) 510, which was decided by the Circuit Court of Appeals for the Eighth Circuit. There a disagreement as to the division of business had arisen between the two district judges for the Eastern District of Oklahoma.

The procedure there followed, as is shown in the report of the case, 14 F. (2d) at 511, was that the disagreeing district judges submitted their disagreement to the Senior Circuit Judge, Judge Sanborn, then of the Eighth Circuit, who thereupon, reciting the disagreement and the submission thereof, made an order which in substance divided the Eastern District of Oklahoma into two territorial divisions, and made a division of business between the two divisions of the District thus constituted.

It was held in *Case* v. *United States*, 14 F. (2d) 510, that a conviction in a criminal case in the division where the case did not rightfully belong under that order was a nullity and the conviction was set aside.

It seems to me to be perfectly clear, that normally, as a disagreement *inter sese* as to the division of business between the district judges of a district can only arise in the District Court and between them, the request for aid in settling their disagreement should be initiated by them and should come from them to the Senior Circuit Judge as the third party named by Section 23 with statutory power to act in settlement of their dispute.

If that is the normal method by which Section 23 of the Judicial Code should be invoked, there certainly would have to be a very marked case of disagreement, which amounted at least to a public scandal, to warrant a departure from that method and to justify the unasked intervention of the Senior Circuit Judge.

Now what have we here?

As I have set forth above, on June 29, 1932, there was filed with the Clerk an agreement for the division of business for the past summer, signed by the eight Judges of this Court.

By that agreed division, Judge Patterson was to sit in Bankruptcy and General Motions from August 15, 1932 through and including August 29, 1932.

There was also filed with the Clerk, on the same day, an agreement, signed by all the judges of this Court, for the division of business for the Court year just beginning —October 1932 to June 1933.

Accordingly, what I have called the domestic economy of this Court was wholly tranquil. There was no disagreement of any kind among the Judges as to the division of business. Therefore, the condition precedent—of disagreement among the District Judges—on which alone the Senior Circuit Judge had a right to step in and make an order of division of the business of the District Court did not exist, and Judge Manton's order of designation of business of August 25, 1932, was entirely void so far as its having any effect on the rules of this Court or the division of business in this Court.

The whole matter may be summed up by saying that when a Circuit Judge is designated to hold a District Court and proceeds to sit therein, he is acting as a District Judge and must obey its rules. He does not carry with him down to the District Court any appellate attributes which put him above the other District Judges of the District Court where he may be functioning. His status *pro hac vice* is the same as theirs and his decisions —like theirs—are subject to the Appellate Jurisdiction of the Circuit Court of Appeals.

6. Judge Knox informs me that no request was made to him by Judge Manton under Rule 1-a for an assignment to deal with the applications of the American Brake Shoe and Foundry Company for the receivership of the Interborough.

Judge Patterson informs me that there was not any application for a receivership order made before him in the American Brake Shoe and Foundry Company case,

Equity No. 70-364, on August 25th or August 26th, although he was at that time sitting in Court or in Chambers and functioning as a Judge of the motion part ready to deal with all such applications.

7. I hold, therefore, that Judge Manton never secured any assignment to sit in the motion part of the District Court.

His orders of August 25th were ineffectual for that purpose, and Judge Knox, as Senior District Judge, did not assign him to the motion part under Rule 1-a.

I hold also that Judge Patterson was the only Judge of this Court who had the power or right to entertain the application for the receivership here in question at the time when it was made.

8. The juridical status of orders made by Judge Manton in this Court in Equity No. 70-364 under the circumstances above described must now be considered.

It must be noted again that, at the time when Judge Manton, on August 26th, made the order appointing receivers for the Interborough Rapid Transit Company, Judge Patterson was sitting and functioning as motion Judge *de jure* in the Bankruptcy and Motion part of this Court.

It is urged upon me nevertheless that Judge Manton had the status of a *de jure* Judge, but that, if he did not, he should be held to have had the status of a motion Judge *de facto*, with the consequence that his orders should be allowed to stand as valid as a matter of public policy. *Norton* v. *Shelby County*, 118 U. S. 425, 441, 442; *Ball* v. *United States*, 140 U. S. 118, 128; *McDowell* v. *United States*, 159 U. S. 596, 601; *Ex parte Henry Ward*, 173 U. S. 452, 456, are cited.

It is true that those cases deal with the status of a Judge *de facto*, but they have not any application here for there cannot be a *de facto* Judge acting or purporting

to act in the Court or in the part of the Court in which a *de jure* Judge is present and functioning. Cf. *United States* v. *Alexander*, 46 Fed. 728, 729; *Hamlin* v. *Kassafer*, 15 Oregon 456, 459; *Boardman* v. *Halliday*, 10 Paige (N. Y.) 223, 232; *Cohn* v. *Beal*, 61 Miss. 398, 399; *Mechem on Public Officers*, Sections 322 and 323, page 216; and see on the general subject *Conover* v. *Devlin*, 15 How. Pr. (N. Y.) 470, 476-479; *Morgan* v. *Quackenbush*, 22 Barb. (N. Y.) 72, 80; 29 Cyk, page 1391, footnote 60.

This seems to me to be a proposition almost as obvious as the fact that two bodies cannot occupy the same space at the same time.

I am aware that the cases to which I have just referred involved statutory offices in the ordinary sense of that term. The office in question here, that of motion Judge, is not such an office but the analogy is perfect, because, by the rules of this Court, there is only one motion Judge in each motion term.

There are three possible categories into which—from the point of view of their relation to a court—Judges may be divided,—(1) Judges *de jure*, (2) Judges *de facto*, and (3) usurping or intruding Judges. Cf. Mechem on Public Officers, Section 321-323, pp. 215-216.

A Judge should, of course, not vacate the order of another Judge of the same rank whether that other Judge, in making the order, was a Judge *de jure* or was acting as a Judge *de facto*. Otherwise litigants would be made the victims of judicial controversialists, and the administration of justice would inevitably tend to become chaotic.

But with a usurping or intruding Judge the rule is different for the orders of such a Judge are wholly void, cf. *United States* v. *Alexander*, 46 Fed. 728, 731, and on the general principle involved, also *Manning* v. *Ketcham*, 58 F. (2d) 948, 949, and tend to mislead the public as to the status of litigations in the Court.

58 *Opinion.*

Consequently, in order to prevent chaotic conditions and the perpetuation by the intruder of his irregular procedure, a Judge *de jure* may always vacate and declare void the orders of a usurping or intruding Judge. Cf. suggested analogy in *Morton* v. *Shelby County*, 118 U. S. 425, 442. His so doing is ultimately for the benefit of the litigants involved in the cause wherein the orders are vacated, and may, if his act is timely, prevent irreparable injury to one or all of them. This is especially true of the situation here involved, for a consent receivership in equity, not being the result of a controversy but of an
59 agreed situation, should have a jurisdictional foundation beyond suspicion before a Court takes over the operation of the estate.

As a result of the most careful reflection of which I am capable on the very unusual situation before me, I hold, for the reasons above given, that Judge Manton's orders in this Court appointing receivers of the Interborough Rapid Transit Company and the Manhattan Railway Company, in Equity No. 70-364, and all other proceedings had by Judge Manton in this Court therein were not proceedings before a Judge *de jure* or before a Judge *de facto*, but were acts which involved usurpation of power which he had not and, consequently, were
60 all *coram non judice* and wholly void and of no effect.

VIII. However, I do not at the present time grant the request to appoint new receivers, for it seems to me that there could not possibly be any more unfortunate situation than to have two sets of receivers contending between themselves for possession of the great property here involved.

But if no appeal from the orders entered herein is taken within twenty days, or, if my decision herein is affirmed on such appeal as may be taken within that time after the return of the mandate from the Appellate

Court to this Court and its filing here, application may be made in pursuance of Rule 11-a to the Judge sitting in the motion part for the appointment of new receivers.

Thus there will not be any interruption of or confusion in the operation of the railroads, pending the settlement of the questions herein involved.

IX. Orders embodying the provisions indicated in my formal decision at the beginning of this opinion may be presented to me for settlement after three days notice, on Tuesday, October 18, 1932, at 2.30 p. m. in my Chambers, Room 1542 Woolworth Building, 233 Broadway, New York City.

October 13, 1932.

WOOLSEY
United States District Judge

164

Order of Consolidation.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,
against

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM
165 ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E. 71-153

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
166 *Plaintiff,*
against

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

IN EQUITY
E. 70-364

The cause of BENJAMIN F. JOHNSON against MANHATTAN RAILWAY COMPANY et al. (E. 71-153-1932), came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, and on its own initiation, against the objec-

tion and protest of the defendants above named, and the American Brake Shoe and Foundry Company complainant in the second above entitled cause No. Equity 70-364, and the intervenors in said last mentioned cause —with the exception of Harold Poliner et al., Protective Committee of Manhattan Railway Guaranteed Stock— City of New York defendant in equity No. 71-153, neither consenting nor appearing,

It is ORDERED, ADJUDGED AND DECREED, that the above cause entitled,

> BENJAMIN F. JOHNSON, Complainant, against MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Defendants, E. 71-153,

and the above cause entitled,

> THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant, E. 70-364,

be, and they hereby are, consolidated into one cause in this Court, and that the consolidated cause proceed under the title of

2170 *Order of Consolidation.*

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

2171

Dated, New York, October 18, 1932.

WOOLSEY
United States District Judge.

(Presented by Charles Franklin)

2172

Order Vacating Orders of Judge Manton.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY #71-153

The case of Benjamin F. Johnson against Manhattan Railway Company, et al. (E 71-153) came on to be heard at this Term on three orders to show cause, and was argued by counsel, and thereupon, upon consideration thereof, and after due deliberation, it is

ORDERED, ADJUDGED AND DECREED that the motions made by the complainant, Benjamin F. Johnson, and the intervenor, Lillian Boehm, in the equity cause of Benjamin F. Johnson against Manhattan Railway Company, et al. (E 71-153), be, and the same hereby are, granted to the extent hereinafter indicated, as follows:

ORDERED, ADJUDGED AND DECREED, that the following orders made by Judge Martin T. Manton in the cause entitled American Brake Shoe and Foundry Company, *v.* Interborough Rapid Transit Company (E 70-364), be, and they hereby are, and each of them is, vacated and set aside as wholly void and of no juridical effect:

(a) Order dated August 26th, 1932, appointing Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company.

(b) Order filed August 26th, 1932, retaining Chadbourne, Stanchfield & Levy, Esqs., as solicitors and general counsel for Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of the Interborough Rapid Transit Company.

(c) Order filed August 29th, 1932, appointing a Protective Committee for Tort Creditors.

(d) Order dated and filed September 1st, 1932, granting leave to intervene to Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bond Holders.

(e) Order dated and filed September 1st, 1932, granting leave to intervene to Committee for Interborough Rapid Transit Company Ten Year Secured Convertible 7% Gold Note Holders.

(f) Order filed September 2nd, 1932, granting leave to intervene to Committee for Interborough Rapid Transit Company Ten Year 6% Gold Note Holders.

(g) Order dated and filed September 6th, 1932, appointing William Roberts as Temporary Receiver of Manhattan Railway Company.

(h) Order dated and filed September 6th, 1932, granting leave to intervene to Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bond Holders.

(i) Order filed September 7th, 1932, retaining Hughes, Sherman & Dwight, Esqs., as attorneys for the Manhattan Receiver, William Roberts.

(j) Order filed September 9th, 1932, amending Order of August 29th, 1932, appointing Creditors' Committee.

(k) Order (#6) filed September 12th, 1932, that all papers and documents filed be numbered.

(l) Order (#7) filed September 12th, 1932, granting leave to Receivers to maintain printed record of all documents.

(m) Order (#8) filed September 12th, 1932, authorizing Receivers to pay necessary expenses.

(n) Order (#9) filed September 14th, 1932, for Receivers not to pay Franchise Tax.

(o) Order dated September 19th, 1932, permitting Central Hanover Bank and Trust Company as Trustee under Consolidated Mortgage of Manhattan Railway Company to intervene.

(p) Order (#17) filed September 27th, 1932, employing Southern District Court reporters.

(q) Order filed September 28th, 1932, granting leave to Central Hanover Bank and Trust Company to join receivers of Manhattan Railway Company and Interborough Rapid Transit Company as parties defendant to complaint to be filed.

(r) Order filed September 29th, 1932, granting leave to the Protective Committee for Manhattan Railway Company 7% Guaranteed Stockholders to intervene.

(s) Order dated September 28th, 1932, and filed September 29th, 1932, continuing the Receiverships of Interborough Rapid Transit Company and Manhattan Railway Company.

(t) Order filed October 4th, 1932, restraining receivers of Interborough Rapid Transit Company from paying taxes, as indicated.

(u) Order filed October 4th, 1932, directing the receivers to take no action to secure the return to them of any sinking fund moneys now held by Guarantee Trust Company.

(v) Order filed October 11th, 1932, accepting resignation of Chadbourne, Stanchfield & Levy, Esqs., as attorneys for the receivers of Interborough Rapid Transit Company.

(w) Order filed October 11th, 1932, appointing Hornblower, Miller, Miller & Boston, Esqs., as at-

torneys for the receivers of Interborough Rapid Transit Company.

(x) Any order which may be filed in conformance to opinion #1, 7401 by Judge Martin T. Manton, filed October 11th, 1932.

(y) Any and all other or further orders made by Judge Martin T. Manton on or after August 26th, 1932, in this Court, in the cause of American Brake Shoe and Foundry Company against Interborough Rapid Transit Company, Manhattan Railway Company, intervenor (Equity No. 70-364), dealing with the Interborough Rapid Transit Company, and/or the Manhattan Railway Company,

and it is further

ORDERED, ADJUDGED AND DECREED that the operation of this order be and the same hereby is suspended for a period of twenty days after the entry of this order to enable the defendants herein to appeal from this order, if they be so advised, and it is further

ORDERED, ADJUDGED AND DECREED that the said motions, in so far as they seek the appointment of new receivers, be and the same hereby are denied without prejudice, at the present time but if no appeal is taken within twenty days or if, after the decision on such appeal as may be taken within that time, this order is affirmed, then after the entry of the Mandate of the Appellate Court in this court, a new application for such appointment may be made, in pursuance of General Rule 11-a of this Court to the Judge who at that time may be assigned to hold the Bankruptcy and Motion part of the business of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that, in so far as said motions seek to have vacated the orders made and signed

on August 25, 1932 by Honorable Martin T. Manton in his capacity as Senior Circuit Judge, they are denied for want of jurisdiction.

WOOLSEY
United States District Judge.

Dated New Yok City
October 18, 1932
signed at
3:37 P. M.
WOOLSEY
U. S. D. J.

(Presented by Charles Franklin)

2188 **SUMMONS (ORDER OF SEPTEMBER 20, 1932).**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.,* 2189 *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* 2190 INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

TO HAROLD PALMER, NORMAN JOHNSON, STANLEY H. LATSHAW, HAROLD SHAW and JOHN W. APPELL, JUNIOR, acting as a Protective Committee for the 7% Guaranteed Stock of MANHATTAN RAILWAY COMPANY, intervenor in the above entitled cause of THE AMERICAN BRAKE SHOE and FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant, In Equity E 70-364, and to MARSHALL & WEHLE, their solicitors, and to THE CITY OF NEW

Summons (Order of September 20, 1932).

York and the Corporation Counsel of The City of New York and to Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company, as an intervenor in the above entitled cause In Equity E 70-364 by reason of an order made and entered therein on September 28, 1932, and to Davies, Auerbach & Cornell, their solicitors:

Please take notice, that the undersigned will present their petition for appeal from an order made and entered on the 20th day of September, 1932, in the above entitled cause of Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153 granting leave to said Benjamin F. Johnson to file his bill of complaint, to the Honorable Robert P. Patterson, at his Chambers, 12th Floor Woolworth Building, 233 Broadway, New York, N. Y., on the 20th day of October, 1932, at which time and place you are requested to join in said petition for the allowance of said appeal.

Dated, October 20th, 1932.

The American Brake Shoe and Foundry Company,
by Breed, Abbott and Morgan.

Interborough Rapid Transit Company,
by James L. Quackenbush.

Manhattan Railway Company,
by Dills, Muecke and Schelker.

Victor J. Dowling and Thomas E. Murray, Jr., as Receivers,
by Hornblower, Miller, Miller & Boston.

Summons (Order of September 20, 1932).

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others as the Committee constituted by and acting under the Deposit Agreement, dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes; and

J. P. MORGAN and others, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Bonds,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others as a Committee for the protection of Ten-Year Six Per Cent. Gold Notes due October 1, 1932 of the Interborough Rapid Transit Company,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990,
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company, dated March 20, 1913,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

Solicitors.

Summons (Order of September 20, 1932).

Service accepted this 20th day of October, 1932 and joinder in said appeal is hereby refused.

MARSHALL & WEHLE
Solicitors for Protective Committee for the 7% Guaranteed Stock of the Manhattan Railway Company, on grounds stated in annexed memorandum.

ARTHUR J. W. HILLY
Corporation Counsel of the City of New York.

DAVIES, AUERBACH AND CORNELL
Solicitors for Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company.

Summons (Order of September 20, 1932).

The intervenors, HAROLD PALMER and others, as the Protective Committee for Manhattan Railway Company 7% Guaranteed Stock, by Marshall & Wehle, their Solicitors, in connection with the foregoing statement of "refusal" to join in the petition of Interborough Rapid Transit Company and others, for allowance of appeals, state that such "refusal" is upon the following grounds, among others: *first*, that their substantive rights as set forth by them in cause E-70-364 have not been adversely affected by the orders which are the subject of said petitions for appeal; *second*, that in cause E-71-153 they filed on September 29, 1932, their petition praying for an order allowing intervention in the event that the District Court in that cause should come to exercise jurisdiction of the receivership of Interborough Rapid Transit Company; and *third*, that their rights, if they are to be asserted through intervention, must be in subordination to whatever cause, in which the District Court finally exercises jurisdiction over receivers of said Company.

October 20, 1932.

MARSHALL & WEHLE,
Solicitors for
Harold Palmer and others.

ORDER OF SEVERANCE (ORDER OF SEPTEMBER 20, 1932).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

MANHATTAN RAILWAY COMPANY,

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

206 *Order of Severance (Order of September 20, 1932).*

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER,
207 HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS,
208 as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

appellants, having presented their petition for appeal from an order entitled in the above entitled cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153", granting leave to said Benjamin F.

Order of Severance (Order of September 20, 1932).

Johnson to file his bill of Complaint, made and entered September 20, 1932, and it appearing that Harold Palmer, Norman Johnson, Stanley H. Latshaw, Harold Shaw and John W. Appell, Junior, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, intervenor in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364," and The City of New York, one of the defendants in the above entitled cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153" and Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, an intervenor in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364", have been duly notified and requested by the solicitors for said appellants to join in said petition for appeal and have failed or refused to join therein, the said appellants are hereby granted the right to appeal alone without joining said Harold Palmer, Norman Johnson, Stanley H. Latshaw, Harold Shaw and John W. Appell, Junior, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, said The City of New York and said Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, as appellants.

Dated, New York, October 20th, 1932.

ROBERT P. PATTERSON,
United States District Judge.

212

PETITION FOR APPEAL FROM ORDER OF SEPTEMBER 20, 1932.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* 213 MANHATTAN RAILWAY COMPANY, *et al.,* *Defendants.*	IN EQUITY E. 71-153.
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364.
IN THE MATTER 214 *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153.

TO THE HONORABLE ROBERT P. PATTERSON, JUDGE OF SAID COURT:

The petition of the undersigned enumerated parties respectfully shows:—

Your petitioners (without recognizing or acknowledging that there is any such cause validly pending in this

Court as "In the Matter of the Interborough-Manhattan Receivership Proceedings, In Equity E 71-153"), pray that they may be permitted to take an appeal to the United States Circuit Court of Appeals for the Second Circuit from the order entered on the 20th day of September, 1932, in the United States District Court for the Southern District of New York, granting leave to said Johnson to file his bill of complaint, in the cause heretofore entitled "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity 71-153", for the reasons specified in the Assignment of Errors which is filed herewith, and your petitioners pray that this appeal may be allowed, that a citation issue, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Your petitioner, The American Brake Shoe and Foundry Company, is complainant in the above entitled cause In Equity, E 70-364 and is a defendant in the cause in Equity E 71-153; your petitioners Interborough Rapid Transit Company and Manhattan Railway Company are defendants in both of the causes first above entitled; your petitioners Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of Interborough Rapid Transit Company, and William Roberts, as Receiver of Manhattan Railway Company, are defendants in the above entitled cause In Equity E 71-153; your petitioners J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, are as such Committee a

party defendant in the above entitled cause In Equity E 70-364; your petitioners J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioners Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, constituting a Committee for the protection of the holders of the Ten-Year Six Per Cent. Gold Notes due October 1, 1932, are as such Committee a party defendant in the above entitled cause In Equity E 70-364; your petitioners Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis, constituting a Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990, are as such Committee a party defendant in the above entitled cause In Equity E 70-364; your petitioner Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company, dated March 20, 1913, is a party to the above entitled cause In Equity E 70-364 by reason of an order made and entered therein on September 28, 1932.

Dated, October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

Petition for Appeal From Order of September 20, 1932.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others, as Committees as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others, as Committee as above,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD, MERLE-SMITH and others, as Committee as above,
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

Solicitors.

Appeal allowed this 20th day of October, 1932, upon giving bond as required by law in the sum of Two Hundred and Fifty Dollars.

ROBERT P. PATTERSON,
U. S. District Judge.

Assignment of Errors on Appeal from Order of Judge Francis G. Caffey, dated September 20, 1932.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

Now come

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

MANHATTAN RAILWAY COMPANY,

Assignment of Errors on Appeal From Order of Judge Francis G. Caffey, dated September 20, 1932. 222

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

2228

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

2229

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

as appellants (without thereby recognizing or acknowledging that there is any such cause validly pending in

Assignment of Errors on Appeal From Order of Judge Francis G. Caffey, dated September 20, 1932.

this Court as "In the Matter of the Interborough-Manhattan Receivership Proceedings, E. 71-153") and file the following Assignment of Errors upon which they will rely in the appeal herewith petitioned for from the order of this Court made in the above entitled cause of "Benjamin F. Johnson, Complainant, against the Manhattan Railway Company, et al., Defendants, In Equity E. 71-153", on the 20th day of September, 1932, to wit:—

1. That the Court erred in making said order of September 20, 1932.

2. That the Court erred in its said order of September 20, 1932 in granting leave to the complainant, Benjamin F. Johnson, in said suit In Equity No. E. 71-153, to file in the United States District Court for the Southern District of New York the bill of complaint mentioned in the petition of said Benjamin F. Johnson referred to in said order, and to make the Interborough Rapid Transit Company, the Manhattan Railway Company and their respective Receivers among the parties defendant to said bill of complaint mentioned in said petition.

3. That the Court erred in holding that it had jurisdiction or power, or authority to enter the said order in said cause.

4. That the Court erred in its said order of September 20, 1932 in thereby dissolving or modifying the injunction contained in the order made by the United States District Court for the Southern District of New York on the 26th day of August, 1932, in the above entitled case, in Equity (E 70-364) signed by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing receivers of the Interborough Rapid Transit Company and enjoining

Assignment of Errors on Appeal From Order of Judge Francis G. Caffey, dated September 20, 1932.

all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

5. That the Court erred in its said order of September 20, 1932 in thereby dissolving or modifying the injunctions contained in the order made by the United States District Court for the Southern District of New York on the 6th day of September, 1932 in the above entitled cause In Equity E 70-364 signed by Hon. Martin T. Manton, United States Circuit Judge duly designated to hold a District Court of the United States for the Southern District of New York, appointing a Receiver for the Manhattan Railway Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the said Receiver was appointed and giving other relief.

6. That the Court erred in making the said order of September 20, 1932 in violation of the terms and provisions of said order made and entered on August 26, 1932, in the above entitled cause of "The American Brake Shoe and Foundry Company, Defendant, In Equity E. 70-364", by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York.

7. That the Court erred in making the said order of September 20, 1932 in violation of the terms and provisions of said order made in the above entitled cause In Equity E 70-364 on the 6th day of September, 1932 by the Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York.

WHEREFORE, said appellants pray that the said order of September 20, 1932 may be reversed and for such

2236 *Assignment of Errors on Appeal From Order of Judge Francis G. Caffey, dated September 20, 1932.*

other and further relief as to the Court may seem just and proper.

New York, N. Y.
October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

2237 MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others, as Committees as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others, as Committee
2238 as above,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as Committee as above,
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.
Solicitors.

BOND ON APPEAL.

The appellants' bond on appeal in the sum of $250 was duly approved and filed, and the printing of the same in the record was waived.

MOTION OF COMMITTEE FOR 7% GUARANTEED MANHATTAN RAILWAY COMPANY TO STRIKE THEIR NAMES FROM CITATION AND ORDER DENYING MOTION.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E 71-153.

Come now HAROLD PALMER, NORMAN JOHNSON, STANLEY R. LATSHAW, HAROLD SWAIN and JOHN W. APPEL, JUNIOR, as the Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, intervenors in cause E 70-364, by their Solicitors, Marshall & Wehle, and move the Court to strike the names of each of said intervenors from the three proposed citations on appeal now being submitted to this Court before any of said citations shall receive the approval or signature of any Judge of this Court.

October 20th, 1932.

MARSHALL & WEHLE
Solicitors.

Denied
(sgd) R. P. P.
U. S. D. J.

42

CITATION ON APPEAL (ORDER OF SEPTEMBER 20, 1932).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

243

244

UNITED STATES OF AMERICA: ss.

To: BENJAMIN F. JOHNSON, and THE CITY OF NEW YORK, and LILLIAN BOEHM, and NATHAN L. AMSTER, MORTON F. STERN, HON. PETER TEN EYCK, C. R. JEFFERS, Secretary, BLIN W. PAGE and CHARLES FRANKLIN, attorney for said Committee, as a Manhattan Railway Company Common Stockholders' Protective Commit-

tee, and HAROLD PALMER, NORMAN JOHNSON, STANLEY H. LATSHAW, HAROLD SHAW and JOHN W. APPELL, JUNIOR, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, and CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, appellees,

GREETING:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit to be held at the Borough of Manhattan, City of New York, on the 9th day of November, 1932, pursuant to an order allowing an appeal from an order granting the appellee, Benjamin F. Johnson, leave to file his bill of complaint with Manhattan Railway Company, William Roberts, as Temporary Receiver of Manhattan Railway Company, Interborough Rapid Transit Company, Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company, The City of New York and The American Brake Shoe and Foundry Company, as defendants, made and entered on the 20th day of September, 1932 in the District Court of the United States for the Southern District of New York, in a suit wherein

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

MANHATTAN RAILWAY COMPANY,

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

2248 *Citation on Appeal (Order of September 20, 1932).*

J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker,
2249 Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis,
2250 as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

are appellants and you are appellees, to show cause, if any there be, why said order rendered against said appellants, should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Citation on Appeal (Order of September 20, 1932).

WITNESS, Honorable Robert P. Patterson, District Judge, this 20th day of October in the year of our Lord, One Thousand Nine Hundred and Thirty-two and of the Independence of the United States of America the One hundred Fifty-seventh.

ROBERT P. PATTERSON,
U. S. District Judge.

Service of a copy of the foregoing citation is acknowledged this 20th day of October, 1932.

CHARLES FRANKLIN,
Solicitor for Benjamin F. Johnson; and for Nathan L. Amster and others, as Committee as above.

ARTHUR J. W. HILLY,
Corporation Counsel of The City of New York.

BOEHM & ZEIGER,
Solicitors for Lillian Boehm.

MARSHALL & WEHLE,
Solicitors for Harold Palmer and others, as Committee as above.

DAVIES, AUERBACH & CORNELL,
Solicitors for Central Hanover Bank & Trust Company, as Trustee as above.

SUMMONS (CONSOLIDATION ORDER).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

To HAROLD PALMER, NORMAN JOHNSON, STANLEY H. LATSHAW, HAROLD SHAW and JOHN W. APPELL, JUNIOR, acting as a Protective Committee for the 7% Guaranteed Stock of MANHATTAN RAILWAY COMPANY, intervenor in the above entitled cause of THE AMERICAN BRAKE SHOE and FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant, In Equity E 70-364, and to MARSHALL

& WEHLE, their solicitors, and to THE CITY OF NEW YORK and the CORPORATION COUNSEL OF THE CITY OF NEW YORK:—

PLEASE TAKE NOTICE, that the undersigned will present their petition for appeal from an order made and entered on the 18th day of October, 1932, consolidating the first two above entitled causes, to the Honorable Robert P. Patterson, at his Chambers, 12th Floor Woolworth Building, 233 Broadway, New York, N. Y., on the 20th day of October, 1932, at which time and place you are requested to join in said petition for the allowance of said appeal.

Dated, October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others as the Committee constituted by and acting under the Deposit Agreement, dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes; and
J. P. MORGAN and others, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Bonds,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others as a Committee for the protection of Ten-Year Six Per Cent. Gold Notes due October 1, 1932 of the Interborough Rapid Transit Company,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990,
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company, dated March 20, 1913,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company,
by DAVIES, AUERBACH AND CORNELL.

Solicitors.

Service accepted this 20th day of October, 1932 and joinder in said appeal is hereby refused.

MARSHALL & WEHLE,
Solicitors for Protective Committee for the 7% Guaranteed Stock of the Manhattan Railway Company, on grounds stated in annexed memorandum.

ARTHUR J. W. HILLY,
Corporation Counsel of The City of New York.

The intervenors, HAROLD PALMER and others, as the Protective Committee for Manhattan Railway Company 7% Guaranteed Stock, by Marshall & Wehle, their Solicitors, in connection with the foregoing statement of "refusal" to join in the petition of Interborough Rapid Transit Company and others, for allowance of appeals, state that such "refusal" is upon the following grounds, among others: *first*, that their substantive rights as set forth by them in cause E-70-364 have not been adversely affected by the orders which are the subject of said petitions for appeal; *second*, that in cause E-71-153 they filed on September 29, 1932, their petition praying for an order allowing intervention in the event that the District Court in that cause should come to exercise jurisdiction of the receivership of Interborough Rapid Transit Company; and *third*, that their rights, if they are to be asserted through intervention, must be in subordination to whatever cause, in which the District Court finally exercises jurisdiction over receivers of said Company.

October 20, 1932.

MARSHALL & WEHLE,
Solicitors for
Harold Palmer and others.

ORDER OF SEVERANCE (CONSOLIDATION ORDER).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

MANHATTAN RAILWAY COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds. 22

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, 227

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under Consolidated Mortgage of Manhattan Railway Company,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

as appellants, having presented their petition for appeal from an order made and entered on the 18th day of October, 1932, consolidating the first two above entitled causes, and it appearing that Harold Palmer, Norman Johnson, Stanley H. Latshaw, Harold Shaw and John W. Appell, Junior, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, intervenor in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364," and The City of New York, one of the defendants in the above entitled cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153" have been duly notified and requested by the solicitors for said appellants to join in said petition for appeal and have failed or refused to join therein, the said appellants are hereby granted the right to appeal alone without joining said The City of New York and said Harold Palmer, Norman Johnson, Stanley H. Latshaw, Harold Shaw and John W. Appell, Junior, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, as appellants.

Dated, New York, October 20, 1932.

ROBERT P. PATTERSON,
United States District Judge.

22

PETITION FOR APPEAL FROM CONSOLIDATION ORDER.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.,* *Defendants.*	IN EQUITY E. 71-153. 227
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364.
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153. 2277

TO THE HONORABLE ROBERT P. PATTERSON, JUDGE OF SAID COURT:

The petition of the undersigned enumerated parties respectfully shows:—

Petition for Appeal From Consolidation Order.

Your petitioners (without recognizing or acknowledging that there is any such cause validly pending in this Court as "In the Matter of the Interborough-Manhattan Receivership Proceedings, In Equity E 71-153"), pray that they may be permitted to take an appeal to the United States Circuit Court of Appeals for the Second Circuit from the order entered in the United States District Court for the Southern District of New York, on the 18th day of October, 1932 in the above entitled cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153", and in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364", consolidating the two said causes into one cause under the title of "In the Matter of the Interborough-Manhattan Receivership Proceedings, In Equity E 71-153", and the proceedings had prior thereto, for the reasons specified in the Assignment of Errors which is filed herewith, and your petitioners pray that this appeal may be allowed, that a citation issue, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Your petitioner, The American Brake Shoe and Foundry Company, is complainant in the above entitled cause In Equity E 70-364, and is a defendant in the cause In Equity E 71-153; your petitioners, Interborough Rapid Transit Company and Manhattan Railway Company are defendants in both of the causes first above entitled; your petitioners, Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of Interborough Rapid Transit Company, and William Roberts, as Receiver of Manhattan Railway Company, are defendants in the

above entitled cause In Equity E 71-153; your petitioners, J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, are as such Committee a party defendant in the above entitled cause In Equity E 70-364; your petitioners, J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bends, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioners, Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, constituting a Committee for the protection of the holders of the Ten-Year Six Per Cent. Gold Notes due October 1, 1932, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioners, Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis, constituting a Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioner, Central Hanover Bank & Trust Company, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company, is a party in the above entitled cause In Equity E 70-364 by reason of an order made and en-

2284 *Petition for Appeal From Consolidation Order.*

tered therein on September 28, 1932; your petitioner, Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company, dated March 20, 1913, is a party to the above entitled cause In Equity E 70-364 by reason of an order made and entered therein on September 28, 1932.

Dated, October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
2285 by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others, as Committees as
2286 above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others, as Committee as above,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as Committee as above,
by COTTON, FRANKLIN, WRIGHT & GORDON.

Petition for Appeal From Consolidation Order.

GUARANTY TRUST COMPANY OF NEW YORK,
as Trustee as above,
by DAVIS, POLK, WARDWELL, GARDINER
& REED.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee as above,
by DAVIES, AUERBACH AND CORNELL.

Solicitors.

Appeal allowed this 20th day of October, 1932, upon giving bonds as required by law in the sum of Two Hundred and Fifty Dollars.

ROBERT P. PATTERSON,
U. S. District Judge.

Assignment of Errors on Appeal from Order of October 18, 1932 (Consolidation Order).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

Now come

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

MANHATTAN RAILWAY COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

Assignment of Errors on Appeal From Order of October 18, 1932 (Consolidation Order).

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under Consolidated Mortgage of Manhattan Railway Company,

96 *Assignment of Errors on Appeal From Order of October 18, 1932 (Consolidation Order).*

as appellants (without thereby recognizing or acknowledging that there is any such cause validly pending in this Court as "In the Matter of the Interborough-Manhattan Receivership Proceedings, E. 71-153") and file the following Assignment of Errors upon which they will rely in the appeal herewith petitioned for from the order of this Court made in the above entitled cause of "Benjamin F. Johnson, Complainant, against the Manhattan Railway Company, et al., Defendants, in Equity E. 71-153" on the 18th day of October, 1932, and made in the
297 above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, in Equity E. 70-364," consolidating the two said causes into one cause under the title of "In the Matter of the Interborough-Manhattan Receivership Proceedings, in Equity E. 71-153" (said order hereinafter for convenience being referred to as the "Consolidation Order") and the proceedings had prior thereto, to wit:—

1. That the Court erred in making said order of October 18, 1932 (Consolidation Order).

298 2. That the Court erred in its said order of October 18, 1932 (Consolidation Order) in ordering that the said cause of "Benjamin F. Johnson *v.* Manhattan Railway Company, et al., Defendants, In Equity E. 71-153," and the said cause of "The American Brake Shoe and Foundry Company, Complainant, *v.* Interborough Rapid Transit Company, Defendant, In Equity E. 70-364," should be consolidated into one cause in this Court under the title of "In the Matter of the Interborough-Manhattan Receivership Proceedings, In Equity E. 71-153."

3. That the Court erred in making the said order of October 18, 1932 (Consolidation Order) in thereby

dissolving or modifying the injunctions contained in the orders made and entered in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, *v.* Interborough Rapid Transit Company, Defendant, in Equity E. 70-364," by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on August 26, 1932 and on September 28, 1932, appointing Receivers of the Interborough Rapid Transit Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

4. That the Court erred in making the said order of October 18, 1932 (Consolidation Order) in violation of the orders made and entered in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364," by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on August 26, 1932 and on September 28, 1932, appointing Receivers of the Interborough Rapid Transit Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

5. That the Court erred in its said order of October 18, 1932 (Consolidation Order) in thereby dissolving or modifying the injunctions contained in the orders made by the United States District Court for the Southern District of New York on the 6th day of September, 1932 and on the 28th day of September, 1932 in the above en-

Assignment of Errors on Appeal From Order of October 18, 1932 (Consolidation Order).

titled cause In Equity E 70-364 signed by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing a Receiver for the Manhattan Railway Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the said Receiver was appointed and giving other relief.

6. That the Court erred in making and entering said order of October 18, 1932 (Consolidation Order) in violation of the terms and provisions of the said orders made in the above entitled cause In Equity E. 70-364 by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on the 6th day of September, 1932 and on the 28th day of September, 1932.

7. That the Court erred in holding that it had jurisdiction or power, or authority to make the said order of October 18, 1932 (Consolidation Order).

8. That the Court erred in holding that the two causes In Equity No. E. 70-364 and No. E. 71-153 were so related as to make it reasonable or appropriate that they be consolidated.

9. That the Court erred in consolidating the two causes In Equity E 70-364 and E 71-153 as a medium of getting the said two independent suits united so that the parties plaintiff in the said cause In Equity E 71-153 might thereby claim to have acquired a standing as plaintiffs or intervenors or otherwise in said cause In Equity E 70-364 which would entitle them to take proceedings in said cause In Equity 70-364 as if they were parties or intervenors therein.

Assignment of Errors on Appeal From Order of October 18, 1932 (Consolidation Order).

10. That the Court erred in holding that by consolidating the said two causes In Equity E 70-364 and E 71-153, it thereby obtained the power to properly make an order in the Johnson Cause In Equity E 71-153 which would affect the receivership orders and the other orders made in The American Brake Shoe and Foundry Company case In Equity E 70-364.

11. That the Court erred in holding that the bills of complaint of said Benjamin F. Johnson in the cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153," as supplemented, state facts sufficient to constitute a cause of action.

12. That the Court erred in holding that upon the allegations of the bill of complaint and the supplemental bill of complaint of Benjamin F. Johnson and the supplemental bill of complaint of Lillian Boehm in said cause In Equity E. 71-153, complainants were entitled to maintain a suit in equity although essential allegations were shown to be without foundation by answering affidavits.

13. That the Court erred in holding that the cause entitled "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153," as the same stood in this Court on October 18, 1932, is within the jurisdiction of the United States District Court.

14. That the Court erred in holding that the cause entitled "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity No. E 71-153" is within the jurisdiction of the Court, notwithstanding the intervention of Lillian

Assignment of Errors on Appeal From Order of October 18, 1932 (Consolidation Order).

Boehm, a citizen and resident of the State of New York, as a party plaintiff, with the consent of the plaintiff Benjamin F. Johnson.

WHEREFORE, said appellants pray that the said order may be reversed and for such other and further relief as to the Court may seem just and proper.

New York, N. Y.
October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others, as Committees as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others, as Committee as above,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as Committee as above,
by COTTON, FRANKLIN, WRIGHT & GORDON.

Bond on Appeal.
Citation on Appeal (Consolidation Order).

GUARANTY TRUST COMPANY OF NEW YORK,
as Trustee as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.
CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee as above,
by DAVIES, AUERBACH AND CORNELL.
Solicitors.

BOND ON APPEAL.

The appellants' bond on appeal in the sum of $250 was duly approved and filed, and the printing of the same in the record was waived.

CITATION ON APPEAL (CONSOLIDATION ORDER).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

UNITED STATES OF AMERICA: ss.

TO: BENJAMIN F. JOHNSON, and THE CITY OF NEW YORK

1a *Citation on Appeal (Consolidation Order).*

and Lillian Boehm, and Nathan L. Amster, Morton F. Stern, Hon. Peter Ten Eyck, C. R. Jeffers, Secretary, Blin W. Page and Charles Franklin, attorney for said Committee, as a Manhattan Railway Company Common Stockholders' Protective Committee, appellees,

GREETING:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit to be held
2a at the Borough of Manhattan, City of New York, on the 9th day of November, 1932, pursuant to an order allowing an appeal from an order consolidating the first two above entitled causes, made and entered on the 18th day of October, 1932 in the District Court of the United States for the Southern District of New York, in a suit wherein

The American Brake Shoe and Foundry Company,

Interborough Rapid Transit Company,

Manhattan Railway Company,

Victor J. Dowling and Thomas E. Murray, Jr., Receivers of the Interborough Rapid Transit Company,

William Roberts, Receiver of the Manhattan Railway
3a Company,

J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1932,

Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company,

are appellants and you are appellees, to show cause, if any there be, why said order rendered against said appellants, should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness, Honorable Robert P. Patterson, District Judge, this 20th day of October in the year of our Lord, One Thousand Nine Hundred and Thirty-two and of the Independence of the United States of America the One hundred Fifty-seventh.

Robert P. Patterson,
U. S. District Judge.

Service of a copy of the foregoing citation is acknowledged this 20th day of October, 1932.

Charles Franklin,
Solicitor for Benjamin F. Johnson; and Nathan L. Amster and others, as Committee as above.

Arthur J. W. Hilly,
Corporation Counsel of The City of New York.

Boehm & Zeiger,
Solicitors for Lillian Boehm.

Marshall & Wehle,

SUMMONS (VACATING ORDER).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

TO HAROLD PALMER, NORMAN JOHNSON, STANLEY H. LATSHAW, HAROLD SHAW and JOHN W. APPELL, JUNIOR, acting as a Protective Committee for the 7% Guaranteed Stock of MANHATTAN RAILWAY COMPANY, intervenor in the above entitled cause of THE AMERICAN BRAKE SHOE and FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant, In Equity E 70-364, and MARSHALL

& WEHLE, their solicitors, and THE CITY OF NEW YORK and the CORPORATION COUNSEL OF THE CITY OF NEW YORK, and CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company, as an intervenor in the above entitled cause In Equity E 70-364 by reason of an order made and entered therein on September 28, 1932, and DAVIES, AUERBACH & CORNELL, their solicitors:

PLEASE TAKE NOTICE, that the undersigned will present their petition for appeal from an order made and entered on the 18th day of October, 1932 vacating certain orders made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364," to the Honorable Robert P. Patterson, at his Chambers, 12th Floor Woolworth Building, 233 Broadway, New York, N. Y., on the 20th day of October, 1932, at which time and place you are requested to join in said petition for the allowance of said appeal.

Dated, October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

320 *Summons (Vacating Order).*

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others as the Committee constituted by and acting under the Deposit Agreement, dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes; and
J. P. MORGAN and others, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Bonds,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

321 CHARLES HAYDEN and others as a Committee for the protection of Ten-Year Six Per Cent. Gold Notes due October 1, 1932 of the Interborough Rapid Transit Company,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990,
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK,
2322 as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company, dated March 20, 1913,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

Solicitors.

Service accepted this 20th day of October, 1932 and joinder in said appeal is hereby refused.

MARSHALL & WEHLE,
Solicitors for Protective Committee for the 7% Guaranteed Stock of the Manhattan Railway Company, on grounds stated in annexed memorandum.

Summons (Vacating Order).

ARTHUR J. W. HILLY,
Corporation Counsel of The City of New York.

DAVIES, AUERBACH AND CORNELL,
Solicitors for Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company.

The intervenors, HAROLD PALMER and others, as the Protective Committee for Manhattan Railway Company 7% Guaranteed Stock, by Marshall & Wehle, their Solicitors, in connection with the foregoing statement of "refusal" to join in the petition of Interborough Rapid Transit Company and others, for allowance of appeals, state that such "refusal" is upon the following grounds, among others: *first*, that their substantive rights as set forth by them in cause E-70-364 have not been adversely affected by the orders which are the subject of said petitions for appeal; *second*, that in cause E-71-153 they filed on September 29, 1932, their petition praying for an order allowing intervention in the event that the District Court in that cause should come to exercise jurisdiction of the receivership of Interborough Rapid Transit Company; and *third*, that their rights, if they are to be asserted through intervention, must be in subordination to whatever cause, in which the District Court finally exercises jurisdiction over receivers of said Company.

October 20, 1932.

MARSHALL & WEHLE,
Solicitors for
Harold Palmer and others.

326 **ORDER OF SEVERANCE (VACATING ORDER).**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

327

328

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

MANHATTAN RAILWAY COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

appellants, having presented their petition for appeal from an order made and entered on the 18th day of October, 1932 in the above entitled consolidated cause vacating certain orders made by Hon. Martin T. Manton,

Order of Severance (Vacating Order).

United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364," and it appearing that Harold Palmer, Norman Johnson, Stanley H. Latshaw, Harold Shaw and John W. Appell, Junior, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, intervenor in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364," and The City of New York, one of the defendants in the above entitled cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153," and Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, an intervenor in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364" have been duly notified and requested by the solicitors for said appellants to join in said petition for appeal and have failed or refused to join therein, the said appellants are hereby granted the right to appeal alone without joining said Harold Palmer, Norman Johnson, Stanley H. Latshaw, Harold Shaw and John W. Appell, Junior, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, said The City of New York and said Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, as appellants.

Dated, New York, October 20th, 1932.

ROBERT P. PATTERSON,
United States District Judge.

PETITION FOR APPEAL FROM ORDER OF OCTOBER 18, 1932 (VACATING ORDER).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY E. 71-153.
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364.
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153.

TO THE HONORABLE ROBERT P. PATTERSON, JUDGE OF SAID COURT:

The petition of the undersigned enumerated parties respectfully shows:—

Petition for Appeal From Order of October 18, 1932 (Vacating Order).

Your petitioners (without recognizing or acknowledging that there is any such cause validly pending in this Court as "In the Matter of the Interborough-Manhattan Receivership Proceedings, In Equity E 71-153") pray that they may be permitted to take an appeal to the United States Circuit Court of Appeals for the Second Circuit from the order entered in the District Court of the United States for the Southern District of New York, on the 18th day of October, 1932, vacating and setting aside certain orders made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364", and the proceedings had prior thereto, for the reasons specified in the Assignment of Errors which is filed herewith, and your petitioners pray that this appeal may be allowed, that a citation issue, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Your petitioner, The American Brake Shoe and Foundry Company, is complainant in the above entitled cause In Equity E 70-364 and is a defendant in the cause In Equity E 71-153; your petitioners, Interborough Rapid Transit Company and Manhattan Railway Company, are defendants in both of the causes first above entitled; your petitioners, Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of Interborough Rapid Transit Company, and William Roberts, as Receiver of Manhattan Railway Company, are defendants in the above entitled cause In Equity E 71-153; your petitioners, J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann

Petition for Appeal From Order of October 18, 1932 (Vacating Order).

Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioners, J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioners, Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, constituting a Committee for the protection of the holders of the Ten-Year Six Per Cent. Gold Notes due October 1, 1932, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioners, Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis, constituting a Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioner Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company, dated March 20, 1913, is a party to the above entitled cause In Equity E 70-364 by reason of an order made and entered therein on September 28, 1932.

Dated, October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

Petition for Appeal From Order of October 18, 1932 (Vacating Order).

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others, as Committees as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others, as Committee as above,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as Committee as above,
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

Solicitors.

Appeal allowed this 20th day of October, 1932, upon giving bond as required by law in the sum of Two Hundred and Fifty dollars.

ROBERT P. PATTERSON,
U. S. District Judge.

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

Now come

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

MANHATTAN RAILWAY COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

as appellants (without recognizing or acknowledging that there is any such cause validly pending in this Court as

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

"In the Matter of the Interborough-Manhattan Receivership Proceedings, E. 71-153") and file the following Assignment of Errors upon which they will rely in the appeal herewith petitioned for from the order of this Court made on the 18th day of October, 1932, vacating and setting aside certain orders made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364" (said order appealed from being hereinafter for convenience sake referred to as the "Vacating Order") and the proceedings had prior thereto:

1. That the Court erred in making said order of October 18, 1932 (Vacating Order).

2. That the Court erred in granting the motions made by the complainant, Benjamin F. Johnson, and the intervenor, Lillian Boehm, in the equity cause of Benjamin F. Johnson, Complainant, against Manhattan Railway Company, Defendant, et al., E 71-153-1932 to the extent indicated in said order.

3. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order dated August 26th, 1932, appointing Victor J. Dowling and Thomas E. Murray, Jr., as

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

Temporary Receivers of Interborough Rapid Transit Company.

4. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed August 26th, 1932, retaining Chadbourne, Stanchfield & Levy, Esqs., as solicitors and general counsel for Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of the Interborough Rapid Transit Company.

5. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed August 29th, 1932, appointing a Protective Committee for Tort Creditors.

6. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interbor-

ough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order dated and filed September 1st, 1932, granting leave to intervene to Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bond Holders.

7. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order dated and filed September 1st, 1932, granting leave to intervene to Committee for Interborough Rapid Transit Company Ten Year Secured Convertible 7% Gold Note Holders.

8. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed September 2nd, 1932, granting leave to intervene to Committee for Interborough Rapid Transit Company Ten Year 6% Gold Note Holders.

9. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton,

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order dated and filed September 6th, 1932, appointing William Roberts as Temporary Receiver of Manhattan Railway Company.

10. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order dated and filed September 6th, 1932, granting leave to intervene to Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bond Holders.

11. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed September 7th, 1932, retaining Hughes, Schurman & Dwight, Esqs., as attorneys for the Manhattan Receiver, William Roberts.

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

12. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed September 9th, 1932, amending Order of August 29th, 1932, appointing Creditors' Committee.

13. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order (#6) filed September 12th, 1932, that all papers and documents filed be numbered.

14. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order (#7) filed September 12th, 1932, granting leave to Receivers to maintain printed record of all documents.

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

15. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order (#8) filed September 12th, 1932, authorizing Receivers to pay necessary expenses.

16. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order (#9) filed September 14th, 1932, for Receivers not to pay Franchise Tax.

17. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order dated September 19th, 1932, permitting Central Hanover Bank and Trust Company as Trustee under Consolidated Mortgage of Manhattan Railway Company to intervene.

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

18. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order (#17) filed September 27th, 1932, employing Southern District Court reporters.

19. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed September 28th, 1932, granting leave to Central Hanover Bank and Trust Company to join receivers of Manhattan Railway Company and Interborough Rapid Transit Company as parties defendant to complaint to be filed.

20. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

74 *Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

Order filed September 29th, 1932, granting leave to the Protective Committee for Manhattan Railway Company 7% Guaranteed Stockholders to intervene.

21. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American
75 Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

Order dated September 28th, 1932, and filed September 29th, 1932, continuing the Receiverships of Interborough Rapid Transit Company and Manhattan Railway Company.

22. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern Dis-
376 trict of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

Order filed October 4th, 1932, restraining receivers of Interborough Rapid Transit Company from paying taxes as indicated.

23. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake

Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed October 4th, 1932, directing the receivers to take no action to secure the return to them of any sinking fund moneys now held by Guaranty Trust Company.

24. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed October 11th, 1932, accepting resignation of Chadbourne, Stanchfield & Levy, Esqs., as attorneys for the receivers of Interborough Rapid Transit Company.

25. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed October 11th, 1932, appointing Hornblower, Miller, Miller & Boston, Esqs., as attorneys for the receivers of Interborough Rapid Transit Company.

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

26. That the Court erred in vacating and setting aside an order described in the Vacating Order as:—

> Any order which may be filed in conformance to opinion #1, 7401 by Judge Martin T. Manton, filed October 11th, 1932.

27. That the Court erred in making an order vacating and setting aside order or orders described in the Vacating Order as:—

> Any and all other or further orders made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on or after August 26th, 1932, in this Court, in the cause of The American Brake Shoe and Foundry Company against Interborough Rapid Transit Company, Manhattan Railway Company, Intervenor (Equity No. 70-364), dealing with the Interborough Rapid Transit Company, and/or the Manhattan Railway Company.

28. That the Court erred in its said order of October 18, 1932 (Vacating Order) in thereby dissolving or modifying the injunctions contained in the orders made by the United States District Court for the Southern District of New York on the 26th day of August, 1932 and September 28, 1932, in the above entitled cause, In Equity E. 70-364 signed by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing receivers of the Interborough Rapid Transit Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

29. That the Court erred in making and entering said order of October 18, 1932 (Vacating Order) in violation of the terms and provisions of said orders made in the above entitled cause In Equity E 70-364 by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on the 26th day of August, 1932 and the 28th day of September, 1932.

30. That the Court erred in its said order of October 18, 1932 (Vacating Order) in thereby dissolving or modifying the injunctions contained in the orders made by the United States District Court for the Southern District of New York on the 6th day of September, 1932 and on the 28th day of September, 1932 in the above entitled cause In Equity E. 70-364 signed by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing a Receiver for the Manhattan Railway Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the said Receiver was appointed and giving other relief.

31. That the Court erred in making said order of October 18, 1932 in violation of the terms and provisions of the said orders made in the above entitled cause In Equity E. 70-364 by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on the 6th day of September, 1932 and on the 28th day of September, 1932.

32. That the Court erred in making the order of September 20, 1932 in said cause In Equity No. E 71-153 signed by the Hon. Francis G. Caffey.

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

33. That the Court erred in its said order of September 20, 1932 in granting leave to the complainant, Benjamin F. Johnson, in said suit In Equity No. E 71-153, to file in the United States District Court for the Southern District of New York the bill of complaint mentioned in the petition of said Benjamin F. Johnson referred to in said order, and to make the Interborough Rapid Transit Company, the Manhattan Railway Company and their respective Receivers among the parties defendant to said bill of complaint mentioned in said petition.

34. That the Court erred in holding that it had jurisdiction or power or authority to enter the said order of September 20, 1932 in said cause No. E 71-153.

35. That the Court erred in its said order of September 20, 1932 in thereby dissolving or modifying the injunctions contained in the order made by the United States District Court for the Southern District of New York on the 26th day of August, 1932, in the above entitled case, In Equity (E. 70-364) signed by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing receivers of the Interborough Rapid Transit Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

36. That the Court erred in its said order of September 20, 1932, in thereby dissolving or modifying the injunctions contained in the order made by the United States District Court for the Southern District of New York on the 6th day of September, 1932 in the above entitled cause In Equity E. 70-364 signed by Hon.

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing a Receiver for the Manhattan Railway Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the said Receiver was appointed and giving other relief.

37. That the Court erred in making its said order of September 20, 1932 in violation of the terms and provisions of said order made in the above entitled cause In Equity E. 70-364 by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on the 26th day of August, 1932.

38. That the Court erred in making its said order of September 20, 1932 in violation of the terms and provisions of said order made in the above entitled cause In Equity E 70-364 by the Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on the 6th day of September, 1932.

39. That the Court erred in making the order in the above entitled cause In Equity E 71-153 on the 18th day of October, 1932 and in the above entitled cause In Equity E 70-364 consolidating the two said causes into one cause under the title of "In the Matter of the Interborough-Manhattan Receivership Proceedings", In Equity E 71-153 (said order for convenience being herein sometimes referred to as the "Consolidation Order").

40. That the Court erred in making the said order of October 18, 1932 (Consolidation Order) in thereby dis-

solving or modifying injunctions contained in the orders made and entered in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, *v.* Interborough Rapid Transit Company, Defendant, In Equity E. 70-364," by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on August 26, 1932 and on September 28, 1932 appointing Receivers of the Interborough Rapid Transit Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

41. That the Court erred in making the said order of October 18, 1932 (Consolidation Order) in violation of the orders made and entered in the above entitled cause of The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364, by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on August 26, 1932, and on September 28, 1932, appointing Receivers of the Interborough Rapid Transit Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

42. That the Court erred in its said order of October 18, 1932 (Consolidation Order) in thereby dissolving or modifying the injunctions contained in the orders made by the United States District Court for the Southern District of New York on the 6th day of September, 1932 and on the 28th day of September, 1932 in the above entitled

cause In Equity E. 70-364 signed by Hon. Martin T. Manton, United States Circuit Judge duly designated to hold a District Court of the United States for the Southern District of New York, appointing a Receiver for the Manhattan Railway Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the said Receiver was appointed and giving other relief.

43. That the Court erred in making and entering said order of October 18, 1932 (Consolidation Order) in violation of the terms and provisions of the said orders made in the above entitled cause In Equity E. 70-364 by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on the 6th day of September, 1932 and on the 28th day of September, 1932.

44. That the Court erred in holding that it had jurisdiction to make said order of October 18, 1932 (Consolidation Order).

45. That the Court erred in holding that the two causes In Equity No. E 70-364 and No. E 71-153 were so related as to make it reasonable or appropriate that they be consolidated.

46. That the Court erred in consolidating the two causes In Equity E 70-364 and E 71-153 as a medium of getting the said two independent suits united so that the parties plaintiff in the said cause In Equity E 71-153 might thereby claim to have acquired a standing as plaintiffs or intervenors or otherwise in said cause In Equity E 70-364 which would entitle them to take pro-

ceedings in said cause In Equity 70-364 as if they were parties or intervenors therein.

47. That the Court erred in holding that by consolidating the said two causes In Equity E 70-364 and E 71-153 it thereby obtained power to properly make an order in the Johnson Cause In Equity 71-153 which would affect the receivership orders and the other orders made in The American Brake Shoe and Foundry Company case In Equity E 70-364.

48. That the Court erred in holding that inasmuch as the said consolidation order was made by the Court on its own initiative, complainants Benjamin F. Johnson and Lillian Boehm in said cause In Equity E 71-153 were left free to challenge the jurisdiction of Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York.

49. That the Court erred in holding that upon the consolidation of the said two causes In Equity No. E. 70-364 and No. E. 71-153, or otherwise the plaintiffs in the Johnson suit, In Equity E. 71-153 acquired a *locus standi* to apply for an order vacating the orders of the Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, above mentioned.

50. That the Court erred in holding that the above mentioned orders made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, were wholly void and of no juridical effect.

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

51. That the Court erred in holding that it had jurisdiction to set aside and vacate the aforementioned orders made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York.

52. That the Court erred in holding that the General Rule of the United States District Court for the Southern District of New York designated as 1-A was a valid or effective limitation of the jurisdiction, power or authority of Hon. Martin T. Manton, as United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, to make the orders above mentioned.

53. That the Court erred in holding that the General Rule of the United States District Court for the Southern District of New York designated as 11-A was a valid or effective limitation of the jurisdiction, power or authority of Hon. Martin T. Manton, as United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, to make the orders above mentioned.

54. That the Court erred in holding that the General Rule of the United States District Court for the Southern District of New York designated as 1-A was a valid rule.

55. That the Court erred in holding that the General Rule of the United States District Court for the Southern District of New York designated as 11-A was a valid rule.

56. That the Court erred in holding that Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the South-

404 *Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

ern District of New York, in making the said orders hereinabove referred to which are vacated by said order of this Court of October 18, 1932 (Vacating Order) did not act under the authority of the so-called blanket designation made by him on March 20, 1930.

57. That the Court erred in holding that the General Rules of the United States District Court for the Southern District of New York designated as 1-A and 11-A prevented Hon. Martin T. Manton, United States Circuit
405 Judge designated to hold a District Court of the United States for the Southern District of New York, from acting under the so-called blanket designation made by him on March 20, 1930.

58. That the Court erred in holding that the bills of complaint of said Benjamin F. Johnson in the cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E. 71-153," as supplemented, state facts sufficient to constitute a cause of action.

59. That the Court erred in holding that upon the
406 allegations of the bill of complaint and the supplemental bill of complaint of Benjamin F. Johnson and the supplemental bill of complaint of Lillian Boehm in said cause In Equity E. 71-153, complainants were entitled to maintain a suit in equity although essential allegations were shown to be without foundation by answering affidavits.

60. That the Court erred in holding that upon the consolidation of the said two causes in Equity No. E. 70-364 and E. 71-153, the said order of the Court made on October 18, 1932 (Vacating Order), would not be a col-

lateral attack on the above mentioned orders of the Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York.

61. That the Court erred in holding that the Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, exceeded his statutory authority as Senior Circuit Judge when, in the designation order of August 25, 1932, he assigned himself particularly to hear and determine all the proceedings in the matter of The American Brake Shoe and Foundry Company against the Interborough Rapid Transit Company.

62. That the Court erred in holding that the order made by the Hon. Martin T. Manton, as Senior Circuit Judge, on August 25, 1932, referred to as the Division of Business Order, was entirely void so far as its having any effect on the rules of the United States District Court for the Southern District of New York, or on the division of business in said Court.

63. That the Court erred in holding that the order of Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing receivers of the Interborough Rapid Transit Company and Manhattan Railway Company, in the cause In Equity No. E. 70-364, and all other proceedings had by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, under said order in said Court, were not proceedings before a judge *de jure*

410 *Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

or before a judge *de facto*, but were acts which involved an usurpation of power.

64. That the Court erred in holding that the cause entitled Benjamin F. Johnson, Complainant, against Manhattan Railway Company, Defendant, In Equity No. E. 71-153, as the same stood in this Court on October 18, 1932, is within the jurisdiction of the United States District Court.

411 65. That the Court erred in holding that the cause entitled "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, Defendant, In Equity No. E 71-153", is within the jurisdiction of the Court, notwithstanding the intervention of Lillian Boehm, a citizen and resident of the State of New York, as a party plaintiff, with the consent of the plaintiff, Benjamin F. Johnson.

WHEREFORE, said appellants pray that the said order may be reversed and for such other and further relief as to the Court may seem just and proper.

New York, N. Y.
412 October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order). 24

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others, as Committees as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others, as Committee as above,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as Committee as above, 24
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

Solicitors.

BOND ON APPEAL.

The appellants' bond on appeal in the sum of $250 was duly approved and filed, and the printing of the same in the record was waived. 241

416

CITATION ON APPEAL (VACATING ORDER).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.,* *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

417

418

UNITED STATES OF AMERICA: ss.

TO: BENJAMIN F. JOHNSON, THE CITY OF NEW YORK, and LILLIAN BOEHM, and NATHAN L. AMSTER, MORTON F. STERN, HON. PETER TEN EYCK, C. R. JEFFERS, Secretary, BLIN W. PAGE and CHARLES FRANKLIN, attorney for said Committee, as a Manhattan Railway Company Common Stockholders' Protective

Committee, and HAROLD PALMER, NORMAN JOHNSON, STANLEY H. LATSHAW, HAROLD SHAW and JOHN W. APPELL, JUNIOR, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, and CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, appellees,

GREETING:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit to be held at the Borough of Manhattan, City of New York, on the 20th day of November, 1932, pursuant to an order allowing an appeal from an order vacating certain orders theretofore made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364," made and entered on the 18th day of October, 1932 in the District Court of the United States for the Southern District of New York, in a suit wherein

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

MANHATTAN RAILWAY COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER,

422 *Citation on Appeal (Vacating Order).*

HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES
423 E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4%
424 Bonds,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

are appellants and you are appellees, to show cause, if any there be, why said order rendered against said appellants, should not be corrected, and why speedy justice should not be done to the parties on that behalf.

WITNESS, Honorable Robert P. Patterson, District Judge, this 20th day of October in the year of our Lord,

One Thousand Nine Hundred and Thirty-two and of the Independence of the United States of America the One hundred Fifty-seventh.

ROBERT P. PATTERSON,
U. S. District Judge.

Service of a copy of the foregoing citation is acknowledged this 20th day of October, 1932.

CHARLES FRANKLIN,
Solicitor for Benjamin F. Johnson; and Nathan L. Amster and others, as Committee as above.

ARTHUR J. W. HILLY,
Corporation Counsel of The City of New York.

BOEHM & ZEIGER,
Solicitors for Lillian Boehm.

MARSHALL & WEHLE,
Solicitors for Harold Palmer and others, as Committee as above.

DAVIES, AUERBACH & CORNELL,
Solicitors for Central Hanover Bank & Trust Company, as Trustee as above.

428

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.*	IN EQUITY E. 71-153
429 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* 430 INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

IT IS HEREBY CONSENTED AND AGREED by the solicitors for the appellees that the printing of the appellants' bonds on appeal in the record be and the same hereby is waived.

Dated: October 22, 1932.

24

CHARLES FRANKLIN
Solicitor for Appellees Benjamin F. Johnson; and Nathan L. Amster and others, as Manhattan Railway Company Common Stockholders' Protective Committee.

BOEHM & ZEIGER
Solicitors for Appellee Lillian Boehm.

24

MARSHALL & WEHLE
Solicitors for Appellees Harold Palmer and others, as Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company.

DAVIES, AUERBACH & CORNELL
Solicitors for Appellee-Appellant Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company.

24

2434 **Minutes of Hearing Before Judge Woolsey October 4, 1932.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,
vs.

MANHATTAN RAILWAY COMPANY, subject to leave of Court; WILLIAM
2435 ROBERTS, as Temporary Receiver of Manhattan Railway Company, Interborough Rapid Transit Company, subject to leave of Court; VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of Interborough Rapid Transit Company, THE CITY OF NEW YORK and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY 71-153

2436

Before: HON. JOHN M. WOOLSEY, *District Judge.*

NEW YORK, OCTOBER 4, 1932.

APPEARANCES:

CHARLES FRANKLIN, Esq., Solicitor for Complainant.

LOUIS BOEHM, Esq., Solicitor and Counsel for Lillian Boehm, intervenor.

LLOYD PAUL STRYKER, Esq., Solicitor and Counsel for holders of the ten-year, 6% Gold Notes Committee of Interborough Rapid Transit Company.

BREED, ABBOTT & MORGAN, Esqrs., Solicitors for The American Brake Shoe & Foundry Company, Complainant,
By PARIS S. RUSSELL, Counsel.

CHADBOURNE, STANCHFIELD & LEVY, Esqrs., Solicitors for the Receivers of the Interborough Rapid Transit Company, Messrs. Dowling and Murray,
WILLIAM GUTHRIE, Esq., and
WILLIAM WALLACE, Esq., Counsel.

JAMES L. QUACKENBUSH, Esq., Solicitor for the Interborough Rapid Transit Company.

ARTHUR J. W. HILLY, Esq., Corporation Counsel of The City of New York,
F. E. CARSTARPHEN, Esq.,
EDWARD J. KOHLER, Esq., and
HARRY HERTZOFF, Esq., of Counsel.

LAWRENCE BERENSON, Esq., Solicitor for Complainant in an action entitled Barber *vs.* Manhattan Elevated R. R. Co., the Interborough Rapid Transit Company and the Receivers of the Interborough Rapid Transit Co.

DILLS, MUECKE & SHELKER, Esqrs., Solicitors for Manhattan Railway Company,
JACK J. LAWRENCE, Esq., Counsel.

ELON S. HOBBS, Esq., Solicitor for Independent Security Holders who have not filed their securities with Protective Committee, but have filed a petition.

LOUIS B. WEHLE, Esq., Solicitor for the Guaranteed Stock Stockholders Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED, Solicitors for the 7% Note Holders' Committee and 5%

Minutes of Hearing Before Woolsey, J., October 4, 1932.

Bondholders' Committee, both Committees of Interborough Rapid Transit Company securities, Edwin S. S. Sunderland, Esq., Counsel.

Mr. Franklin: If there are no other appearances, your Honor——

The Court: I assume we have them all. We want a complete record. And I assume that everyone who has appeared and has given his name is a member of the Bar of this Court.

Mr. Hobbs: If your Honor please, as I understand all those who have appeared so far either represent the various corporations or so-called protective committees. Can those, that is, we who are not depositing with committees our securities, but have securities in these properties appear on our own behalf and those who desire to join with us, who are individuals?

The Court: If you have some basis for your appearance.

Mr. Hobbs: We have a basis in this: that I represent Manhattan shareholders and own some myself.

The Court: Are you a party to any proceeding in the case at present or have you filed any papers?

Mr. Hobbs: I filed a petition in the other proceeding which was denied from which at present no appeal has been taken. By the way we hardly know where we want to turn just now.

The Court: I see no reason why you should not enter an appearance on the record here if that is the case.

Mr. Hobbs: Elson S. Hobbs, for Independent Security Holders who have not filed their securities with the Protective Committee.

The Court: But have filed a petition in this case?

Mr. Hobbs: Filed a petition.

The Court: What is the name of the other case. I mean the number of the other case. Equity what?

Mr. Hobbs: I do not recall the name or number of the case, if your Honor please. My petition was denied and I have not decided whether I shall appeal or not.

Mr. James P. Kohler: I would like to have my appearance noted. I am an attorney of this Court and I appear in person as a stockholder of the Interborough and the Elevated. James P. Kohler.

The Court: Yes, but have you filed any petition in the case?

Mr. Kohler: I have not filed anything yet.

The Court: This is not a proceeding in that sense. I do not think I can take your appearance.

Mr. Wehle: Louis B. Wehle appears for the Guaranteed Stock of Stockholders Committee. We have filed a petition.

Mr. Sunderland: I desire to enter the appearance of Davis, Polk, Wardwell, Gardiner & Reed, by Edwin S. S. Sunderland appearing in behalf of the 7% Note Holders' Committee and 5% Bondholders' Committee, both Committees of Interborough Rapid Transit Company securities who are parties to the entire proceeding.

The Court: Are those all the appearances?

(No response.)

The Court: All right.

Mr. Franklin: I was telephoned yesterday afternoon by Charles H. Tuttle that the merits of the proceeding would be adjourned until probably Thursday. So my remarks will be directed simply to the question of whether the application should be heard by the full Bench.

The Court: Yes; that is right. I told Mr. Tuttle we would do that. He wanted to go up to the Republican Convention as he was free from the Davis case. If he did not go up they might think that he was sort of sulking in his tent.

Mr. Franklin: He told me that. Now, if the Court please, it is granted in advance that this is a discre-

446 *Minutes of Hearing Before Woolsey, J., October 4, 1932.*

tionary matter with the Court. We know that we are not entitled to have a proceeding of even this unusual character heard by the entire District Court Bench. We have been unable to find any authority in the books which justify a litigant to ask to have an application, regardless of its importance, heard before the full bench, but I myself had cases in the Eastern District where the Court sat en banc because of certain facts that had been developed. Those were three accident cases in which I was acting as counsel for the Southern Pacific. They involved rather important amounts. Certain statements had been
447 made, and the Judge hearing the motion, as your Honor is, decided that the entire bench was involved and he directed me to present an application in connection with my proceedings to have this attorney disbarred from practice. I was also requested to notify the Bar Association, sitting in Brooklyn, and Meyer Steinbrink, now Justice Steinbrink, was present and also represented other associations.

Here we have a most unusual situation One of the chief points that will be taken up when we come to argue the case on Thursday is whether there was an actual disagreement among the eight Judges of this Court.
448 Some of the orders that were made were specifically based upon that premise. I know of no practice by which an attorney can ask Judges to furnish affidavits, or even to make statements that would be acceptable that would become a part of the record in a case of this kind, as to whether or not there was a disagreement among the Judges. We know that was not from things that have been said to me. Therefore, and in view of the importance of the case we asked, in both orders to show cause, that this application be heard by the full Bench.

The Court: Do you give any reason why? One might poll one's colleagues, so to speak, in order to find out

whether we had any disagreement, a vote viva voce with all the judges present, so to speak. I could make a deposition on the subject and then judge it myself.

Mr. Franklin: Yes. I think that practice is usually deprecated; to ask a judge to make affidavits.

The Court: No, but for one judge to ask another or ask all of his colleagues, of course we could do that.

Mr. Franklin: This is our thought: In view of the importance of the case, and in view of the fact that the jurisdiction of Judge Manton will depend itself on whether there was an actual disagreement among the judges in this court it seemed to us at least that the other judges should be asked to sit by invitation when the matter came up.

Now, taking even Section 23 of the Judicial Code which is one of the statutes that are directly involved in the case——

The Court: That is "Division of Business".

Mr. Franklin: That is right. It is stated there that in districts like where they have more than one district judge, like the district here, the judges may agree upon the division of business. We took that into account. We said here was a case that involved the entire bench. There was a question of fact involved. True, the matter is purely discretionary. We say that this is a proper case in which that discretion should be exercised in favor of allowing the judges to sit, if only as friends of the Court. I think it would simplify the proceeding, and there are certain efforts in connection with the procedure that I think should commend itself to a court of equity. But beyond the three cases I cited—I remember one of the names, *Rauches* vs. *Southern Pacific Company;* the other was *Martinez*, and the other *William McManus*, and in those cases the senior judge in Brooklyn definitely decided that the matter should be heard en banc, and I think in view of that, and without going into the merits

452 *Minutes of Hearing Before Woolsey, J., October 4, 1932.*

of the case, that it would be right to do it in this case, but, first and last, we know that it is purely a discretionary matter.

Mr. Boehm: If your Honor please, I am joining in Mr. Franklin's motion; that this motion shall be heard before the full bench. We believe that the property rights involved, as well as the importance of the question to the Court itself, aside from the property rights involved, justifies the full bench in hearing this motion.

In the first place we have a situation where property worth roughly $400,000,000 is involved in this receiver-
453 ship. We have the question as to whether the receiverships who were appointed by Judge Manton, have been properly appointed by him or not; whether they are in fact receivers of this vast transit system; whether they are in fact rightfully collecting millions of dollars each week in fares; whether the other orders which have been made by Judge Manton, such as the order which I understand was made yesterday requiring the payment of interest upon the Manhattan bonds; whether the orders which I understand are to be made, according to this morning's newspapers, appointing Samuel Seabury as master to hear the question of the termination of the
454 lease from the Interborough Rapid Transit Company to the Manhattan Railway Company; whether the order making the receiverships permanent, and whether the various other orders which must be made in this highly important litigation, and the validity of which is called into question here—whether those orders are valid or invalid is a matter of great public importance; not only to the security holders of the Interborough and of the Manhattan, but also to the public at large.

In addition to that we have the situation where there is or may be a conflict as to the jurisdiction of the judges of this court. Judge Manton this motion directly attacks,—the validity of Judge Manton's order designat-

ing himself to sit, or to hold the term of the District Court; it directly attacks the validity of the order of Judge Manton in which he disagrees with the other judges of this court as to the disposition of business. It directly attacks his right to disagree as to the division of business and it directly affects the procedure and administration of justice of this court. It is an unprecedented situation in this district, and so far as I know it is an unprecedented situation in any other district, and we say, in view of the importance of this matter and the vast amounts of money involved to the security holders of these companies, the interest of the public which is involved, the interest of the Court which is involved, that if ever there was a case, a proper case, where the motion should be heard by the full bench, this is the case.

Now we think that the Judges of this court have the right to hear this motion en banc, because Section 23 of the Judicial Code says that in districts having more than one district judge the judges may agree upon the division of business and assignment of cases for trial in said district. That is to say, they may make such assignments as they see fit amongst themselves, and if they consider the case of sufficient importance they may all sit upon a particular case which they consider of requisite importance for that purpose.

Of course we think that they should sit as judges of the court. I think on that all of the judges should act as the court in hearing this motion, but, of course, as Mr. Franklin has said, this matter is discretionary with your Honor and with the other judges of the court, and if your Honor prefers you may have them sit in an advisory capacity with you and make the order as your order; or, you may have them sit as the court making the order in this case, but we do submit that this is a matter of sufficient importance, if there ever was such a matter,

58 *Minutes of Hearing Before Woolsey, J., October 4, 1932.*

as to require the hearing of this motion by all the judges of this court.

Mr. Franklin: May I make one suggestion, if the Court please: I particularly mentioned the fact that the case on the merits was adjourned until Thursday. I had in mind that that would give your Honor an opportunity to talk to the other judges to see whether, under that particular clause, it would not be right to order the court to sit en banc.

Mr. Guthrie: May it please the Court: I think I am
59 voicing the views of all the defendants when I state that we are not prepared to take the responsibility of agreeing to the establishment of any such precedent as is urged upon you here. Of course no statutory authority exists for it, and there is no precedent. The precedent in the Eastern District, when the court was considering the disbarment of an officer of the court, as to which all the judges had more or less knowledge, is, of course, no precedent at all. The suggestion that has been made that there is a question of fact as to whether the eight appointed District Judges, agreed to Rules 1-A and 11-A, is an error. There is no question of fact in regard to that. Those rules were published over the signatures of the
60 eight District Judges. It is simply preposterous to say—

The Court: I understood his point was that there was a disagreement as to the division of business, and not as to the rules having indicated a division.

Mr. Guthrie: But there is no disagreement as to the division of business.

The Court: But I say that was one of the points he was raising; that there had not been a disagreement as to division of business as was recited in some order. You see I have been away on a holiday and I knew nothing about the orders. I have never read the orders to show cause even.

Mr. Guthrie: The only suggestion of disagreement is that the senior Circuit Judge, when he designated himself to hold a district court under the authority of the statute, entered an order in which he stated that he did not agree with the provisions in regard to the division of judicial business contained in those rules.

The Court: That was after he had joined the court?

Mr. Guthrie: After he had joined the court. Of course your Honor realizes that if, in every case where an attorney or a party shows that large and important interests are involved, you are to be called upon to ask the assistance of your seven associates who sit here en banc to hear them, we would have a practice that would be quite anomalous, and a practice that would have very little justification in the due administration of justice.

The Court: Well, it will destroy the progress of other parts of the court entirely. Of course it does not seem to me, Mr. Guthrie,—I do not want to interrupt, but I do not think I need hear this any longer,—it seems to me this is a very important case, and I think that if, as Mr. Franklin suggests, there were ever a case where it is necessary to get more than one district judge to sit in it, this would seem that it might be such a case, and I cannot say that there might not be such cases; one can never visualize what cases can arise, or, another might conceive that on the facts, as such, there might be some necessity, but to others it might be obvious that it might not be at all necessary. In this case it seems to me unnecessary. I am the motion Judge here, and exercising my discretion, and I am going to hear this motion on the merits myself and I am going to hear it at ten-thirty on Thursday morning in this room. I should, accordingly, appreciate it if the parties would have their briefs ready by that time. My idea of the way that we ought to do it is that if we have the authorities, and I should suppose there would be very few that would have very much

164 *Minutes of Hearing Before Woolsey, J., October 4, 1932.*

bearing on it, we could get the books down and our hearing then would be something like the hearings in an English court; that is, a conference between counsel and the court, and, if possible, we might arrive at a decision that day, or, at any rate shortly thereafter. Consequently that is the disposition I make of the case. I adjourn this motion then until ten-thirty o'clock on Thursday morning.

(Adjourned to Thursday, October 6, 1932, at 10:30 o'clock A. M.)

165

166

Minutes of Hearing Before Judge Woolsey, October 6, 1932.

BENJAMIN F. JOHNSON *vs.* MANHATTAN RAILWAY CO., Etc., et al.	IN EQUITY 71-153

Before: HON. JOHN M. WOOLSEY, District Judge.

NEW YORK, OCTOBER 6, 1932.

APPEARANCES:

CHARLES FRANKLIN, Esq., Solicitor for Complainant.

LOUIS BOEHM, Esq., Solicitor and Counsel for Lillian Boehm, intervenor.

LLOYD PAUL STRYKER, Esq., Solicitor and Counsel for holders of the ten-year 6% Gold Notes Committee of Interborough Rapid Transit Company.

BREED, ABBOTT & MORGAN, Esqrs., Solicitors for The American Brake Shoe & Foundry Company, Complainant,
CHARLES H. TUTTLE, Esq.,
W. K. PETTIGRUE, Esq.,
PARIS S. RUSSELL, Esq., Counsel.

HUGHES, SCHURMAN & DWIGHT, Esqrs., Solicitors for William Roberts, Receiver of Manhattan Railway Company,
CHARLES E. HUGHES, JR., Esq.,
ALLEN S. HUBBARD, Esq., Counsel.

CHADBOURNE, STANCHFIELD & LEVY, Esqrs., Solicitors for the Receivers of the Interborough Rapid Transit Company, Messrs. Dowling and Murray,
WILLIAM D. GUTHRIE, Esq.,
WILLIAM WALLACE, Esq.,
J. ARTHUR LEVE, Esq.,
JEROME N. FRANK, Esq., Counsel.

JAMES L. QUACKENBUSH, Esq., Solicitor for the Interborough Rapid Transit Company.

ARTHUR J. W. HILLY, Esq., Corporation Counsel of
2471 The City of New York,
F. E. CARSTARPHEN, Esq.,
EDGAR J. KOHLER, Esq.,
HARRY HERTZOFF, Esq., Counsel.

COTTON, FRANKLIN, WRIGHT & GORDON, Esqrs., Solicitors for Protective Committee of Manhattan Consolidated 4's,
CLIFTON MURPHY, Esq.,
B. C. WRIGHT, Esq., Counsel.

LAWRENCE BERENSON, Esq., Solicitor for Complainant in an action entitled Barber *vs.* Manhattan
2472 Elevated R. R. Co., the Interborough Rapid Transit Company and the Receivers of the Interborough Rapid Transit Co.

DILLS, MUECKE & SHELKER, Esqrs., Solicitors for Manhattan Railway Company,
JACK J. LAWRENCE, Esq., Counsel.

ELON S. HOBBS, Esq., Solicitor for Independent Security Holders who have not filed their securities with Protective Committee, but have filed a petition.

LOUIS B. WEHLE, Esq., Solicitor for the Guaranteed Stock Stockholders Committee,
NORMAN JOHNSON, Esq., Counsel.

Minutes of Hearing Before Woolsey, J., October 6, 1932.

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EDWIN S. S. SUNDERLAND, Esq., Counsel.

JOHN J. CURTIN, Esq., Appearing specially for the Transit Commission,
GEORGE H. STOVER, Esq., Counsel.

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HAROLD C. MCCOLLOM, Esq., Counsel.

The Court: Have you got your orders to show cause?

Mr. Franklin: Yes, your Honor, the orders to show cause are right there under the brief, together with an extra copy of the bill supplemental and supplementary.

Mr. Boehm: Here is another order to show cause.

The Court: Mr. Guthrie, are these four all yours?

Mr. Tuttle: I have some here that, if it is appropriate, I will hand up at this time—our affidavits, and attached to them a printed copy of the proceedings of the receivership so far, and also certain exhibits attached to the affidavit and our brief.

The Court: What I was inquiring about, there are four copies of a brief. Is that yours, Mr. Guthrie, a printed brief?

Mr. Guthrie: I believe so, and there are several other briefs.

The Court: I see. There are four copies there.

Mr. Tuttle: The brief that is being handed up now is for the complainant, The American Brake Shoe Company, and affidavits which are being submitted in that connection.

476 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

The Court: All right. Now this is your petition?

Mr. Tuttle: Yes, sir. An affidavit we have submitted.

The Court: That is typewritten?

Mr. Tuttle: The typewritten one. There wasn't time to print that. That is a supplemental affidavit, supplemental to the printed affidavit which you have in your hand, sir.

The Court: That is the printed affidavit (exhibiting)?

Mr. Tuttle: Yes, sir. The typewritten one is supplemental to it.

The Court: And that incorporates this large book
477 by reference to it?

Mr. Tuttle: Yes, sir, incorporated them all.

The Court: Well, now, let me get the three—are there three orders to show cause?

Mr. Franklin: Two orders to show cause in behalf of the plaintiff Johnson and then one in behalf of Lillian Boehm.

The Court: Let us see. This is the Boehm. If I just get the papers arranged, it will be easier for me to follow what you say. And this is another of yours, and this is the other (exhibiting)?

Mr. Franklin: The first was by Judge Caffey and the second by Judge Bondy, the first was dated Sept. 21st.
478

The Court: Are these copies of——

Mr. Franklin: Those are copies of the bills, plaintiffs bills in the case, together with our briefs.

The Court: Now, was there an intervention by Boehm?

Mr. Franklin: There was one intervention, and you also have a copy of that.

Mr. Boehm: There was an intervention by Boehm as a bondholder of Interborough.

The Court: There was an intervention. Have I a copy of that brief?

Mr. Boehm: The order of intervention is on file, the original was.

The Court: I know, but I asked you whether I have a copy of the supplemental brief.

Mr. Boehm: I will submit that, your Honor.

The Court: I think we ought to have all those other papers brought up, Mr. Clerk.

Mr. Hughes: If your Honor please, I have an affidavit here of William Roberts, the Receiver of the Manhattan Railway Company, covering the matters that concern him. I may say that this does not include matters relating to the new supplemental petition that was filed by the complainant, a bill of the complainant which, as I understand it, was filed only this morning and was not served on us, and of which I received a copy only about ten minutes ago. Naturally there has not been any opportunity to consider or deal with that.

The Court: Was there an order permitting that intervention?

Mr. Hughes: That was not intervention, your Honor, as I understand it.

Mr. Franklin: It is a supplemental petition like the affidavits that we have received. All of the affidavits from the other side, and some are very voluminous, were handed in just a few moments ago. We would, of course, ask an opportunity to make reply, if reply is necessary. We have not had an opportunity, could not physically read the immense amount of documents that have been handed to us. But the supplemental petition referred to covers facts that we ascertained yesterday. Petitions were filed and we have given copies to the other side. We assume that when they get ready they will have full opportunity to make reply to it.

The Court: Yes, but is it ready now to go on this morning?

Mr. Tuttle: This supplemental petition was just handed to us five minutes ago and we have had no opportunity to examine it, we don't know whether the facts

supposed to be alleged are actual or not. We may wish to object to it on a number of grounds, and we desire to reserve that right, and also the privilege to answer it if there is anything material found. We can't stop now and read such a voluminous paper.

The Court: And they can't stop now to read yours.

Mr. Tuttle: No.

The Court: And I should suppose that you can tell as the argument proceeded whether any questions of fact have to be dealt with and we could, if necessary, adjourn the argument when it is finished, but it may be it will
83 boil itself down to some question of law; I don't know.

Mr. Tuttle: There is this difference between our papers which we are serving and theirs: This supplemental petition apparently, from a hasty glance, is designed to broaden the situation which we have been called upon to meet here. We were prepared to meet the situation as presented by the papers theretofore served upon us. This supplemental petition apparently calls upon us to meet other matters. Our affidavits which we served on them are merely in reply to the charges in their former papers.

Mr. Franklin: We think that the new petition and all
84 the facts there come within the original and supplemental bill.

Mr. Tuttle: We wish to reserve our rights in that respect.

The Court: Well I know; it is all very well to reserve your rights, but I want to conserve my time. I may sit here all day and then find at the end of it that there is some loose thread involved, and I would a great deal rather adjourn this hearing until Saturday, say, and hear it then if there is any question of having to take another bite at it. I would like to have the whole thing through with and the argument over.

Mr. Boehm: Well, if your Honor desires to have all the papers before you, my suggestion would be that that

be done, because we have been served with voluminous affidavits this morning that we have not had a chance to read, to which we may want to reply; they may want to reply to our supplemental petition, and obviously that matter cannot be submitted today to your Honor.

Mr Tuttle: I suggest that your Honor consider from the argument whether this does not come down to questions of law. A hasty glance at that supplemental petition seems to indicate that it is directed to the propriety of the selection of an individual receiver. Now, it seems to me, as I intimated, that that may be an entirely immaterial and irrelevant consideration, because if there is 2
power to appoint a receiver, the question of the personnel of the receiver is an entirely different matter, not running to jurisdiction, and should be presented by these parties in that particular suit. If they desire to question this selection that has actually been made of any individual receiver, I should think that such a question would not be involved here, and that therefore the whole supplemental petition, if I have correctly diagnosed the case at a hasty glance, would be entirely immaterial and not relevant to the questions of law which are to be presented.

The Court: Well, I think you are right, Mr. Tuttle, from these prayers of the orders to show cause, and I 24
think probably the best thing to do would be to go along with the argument and see how it develops. If it is purely a question of law, of course it would not be necessary to go into that. At any rate I did not understand that any of the questions of personnel of the receivership would be raised today,—unless they do it under the general prayer of their motion. And I think we better go on.

Mr. Franklin: If the Court please, may I ask whether any time limit is going to be made on counsel? I want——

The Court: Absolutely none. I am prepared to sit here until seven o'clock tonight.

Mr. Franklin: Thank you.

488 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

The Court: So that everybody will have a full chance to say anything they properly should say.

Mr. Franklin: If the Court please, by the two orders to show cause, the complainant here asks that this Court vacate and set aside certain orders made by Senior Circuit Judge Manton, appointing receivers for the Interborough Rapid Transit Company and the Manhattan Railway Company. These appointments were made in an equity cause entitled "American Brake Shoe Company *vs.* Interborough Rapid Transit Company." It is our contention that Judge Manton was without authority
489 or power to entertain that bill or to appoint the receivers. We also ask that this Court on this bill take judicial custody of the Interborough Rapid Transit Company and the Manhattan El. and appoint new and independent receivers for both companies.

The complainant, who is a resident of Kentucky, brings this suit in his derivative right as a Manhattan stockholder, and as between this complainant and each of the defendants there is diversity of citizenship. I should also like to add that since our bill was filed approximately $15,000,000 of stock of the Manhattan Railway Company and of the Interborough, and some bondholders, have
490 intervened in this proceeding.

The Court: What was your original amount?

Mr. Franklin: 100 shares. That is, Mr. Johnson is a record holder of 100 shares of Manhattan stock. But as your Honor well knows, in suits of this nature, the entire corporate assets and not the value of complainant's holdings represent the amount involved and in controversy. Of course Mr. Johnson's own holdings would come to $10,000.

If the Court please, we feel that if our contention is correct, that Judge Manton was without power to act officially in this case, then it would obviously be to the advantage of all of the interested parties, including the

security holders and the receivers and their solicitors, to have that matter determined at the outset, rather than hazard the risk of having an appellate court, say, make such a holding say a few months or a few years hence, because the question of jurisdiction is necessarily fundamental and can be raised at any time.

The Court: I should suppose you would put in your order a request—I think you have in your order to show cause, but you have not in your argument, the first thing you move to set aside the order by which Judge Manton designated himself.

Mr. Franklin: Yes.

The Court: To sit in the district court?

Mr. Franklin: Yes.

The Court: That is the first step, is it?

Mr. Franklin: Yes. There was certain incidental relief of that character that we asked, but our position is that if it is held that Judge Manton was without power to entertain the suit or to appoint the receivers, then all of the incidental relief would fall as a natural result, because there would be the—I am coming to that in just a moment.

The Court: I know, but I would just like to have these things developed in orderly fashion.

Mr. Franklin, Yes.

The Court: The first thing you sought was to set aside the receivership orders, and I think the way in which you should deal with the thing, the first question is the question of Judge Manton's assignment of himself, and you haven't even got that.

Mr. Franklin: I think your Honor is entirely correct about that, and I wish to do so.

The Court: Yes, let us do that in an orderly fashion, because it is so confusing if you get into the zone in which it is purely discretionary.

Mr. Franklin: Now, then, your Honor, we have also asked to vacate and set aside the order of Judge Manton dated August 25, 1932, designating himself for a period of thirty days to hear or pass on equity receivership applications, and also the order by which he designated himself as a District Court Judge to particularly hear and determine the application of the American Brake Shoe case.

The Court: All right.

Mr. Franklin: Both were made on the same day.

The Court: I suppose I am the only person in this room, all the counsel must have seen these, but I have not, as I told you before, I have been away on my holiday and this is all perfectly virgin ground to me and I would like very much to read those two orders so I can see what you are talking about exactly.

Mr. Franklin: Yes, sir.

Mr. Tuttle: They are the first two pages in Exhibit A, the big book.

Mr. Franklin: I think you will find that I handed up to your Honor copies of those two orders.

The Court: Well, read them, because I won't take notice. You read them.

Mr. Franklin: Yes.

The Court: What is the date of the first one?

Mr. Franklin: August 25, 1932. This was an order entitled "In the Matter of Division of Business and Assignment of Cases for Trial in the Southern District of New York", and reads as follows:

The Court: August 25?

Mr. Franklin: That is right.

The Court: All right.

Mr. Franklin (Reading):——

Mr. Tuttle: I do not want to interrupt, but that is not the first one. This designating order was the first order.

The Court: Now read that one.

Mr. Franklin: All right. This is an order dated August 25, 1932, reading as follows:

"Whereas, the undersigned as Senior Circuit Judge of the Second Judicial Circuit of the United States, is empowered and authorized by law, pursuant to the provisions of Title 28, Section 22 of the Code of Laws of the United States of America, if the public interest so requires, to designate and assign any Circuit Judge of the Second Judicial Circuit to hold a District Court within such Circuit; and

Whereas, the undersigned, as such Senior Circuit Judge, finds that the public interest requires that Martin T. Manton, a Circuit Judge of the Second Judicial Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a District Court within such Circuit, it is hereby

Ordered, adjudged and decreed, that the said Martin T. Manton be and he hereby is designated and assigned to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the matter entitled *American Brake Shoe and Foundry Co.* vs. *Interborough Rapid Transit Company*, and for such further time as may be required to complete unfinished business."

This is dated New York, August 25, 1932 and signed, Martin T. Manton, Senior Circuit Judge for the Second Judicial Circuit.

The Court: All right. We will refer to that hereafter, just to save trouble, as the order of designation, if you have to talk about it. What is the other order? Another order on the same day.

Mr. Franklin: Another order was made on the same day which was entitled "In the United States Circuit Court of Appeals, Second Judicial Circuit. In the mat-

ter of the Division of Business and Assignment of Cases for Trial in the Southern District of New York.

"Whereas, Martin T. Manton has been duly designated and assigned to hold a District Court of the United States for the Southern District of New York within this Second Judicial Circuit for a period of thirty days from this day; and

"Whereas, Section 23 of the Judicial Code (Mar. 3, 1919, c. 231, Sec. 23, 36 Stat. 1090) provides that 'In Districts having more than one District Judge, the judges may agree upon a division of business and assignment of cases for trial in said District; but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District'; and

"Whereas, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business and assignment of cases for trial in the Southern District of New York as provided in and pursuant to the rules of court for the Southern District of New York heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby——

The Court: By the "then" United States District Judges?

Mr. Franklin: Yes. You see what Judge Manton did there was to appoint himself an additional Judge, and he refers there, and I will come to that in a moment——

The Court: He is still a United States District Judge, I should suppose.

Mr. Franklin (continuing reading): "Ordered, adjudged and decreed, for a period of thirty days beginning with this day, all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the District Judge designated to hear such application pursuant to Rule 11-A of the General Rules of the District Court for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York."

This order is also dated New York, August 25, 1932 and is signed Martin T. Manton, without any designation.

The Court: Well, this venue, so to speak, is in the Circuit Court of Appeals and it is an order which I can take judicial notice of. It is an order issued by him as Senior Circuit Judge, dividing the business, or purporting to divide the business, under Section 23?

Mr. Franklin: That is right. Now, if the Court please, at the time the American Brake Shoe bill——

The Court: I would like to ask a question.

Mr. Franklin: Certainly.

The Court: When was the bill in the American Brake Shoe and Foundry Company case filed in this court?

Mr. Franklin: It was filed on August 26, 1932, a day after this designation. I wanted to point out that at the time that he designated himself to act in this case, particularly to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Company against Interborough Rapid Transit Company that that matter was not in existence. It was not filed until the next day.

Mr. Tuttle: I think I ought to say that he is mistaken about that. The bill of complaint was presented to Judge Manton on August 25th.

The Court: It was not filed in court he said.

Mr. Franklin: It was not filed.

The Court: Exactly, and that is the first thing to do; to file the bill in court.

Mr. Tuttle: It was physically before Judge Manton.

The Court: Oh, it was physically before him. I suppose that we are dealing with a question like this strictí juris. The effect of whatever happens today will be, I suppose, so far as the District Court is concerned, to clear title and remove any questions about jurisdiction or change of jurisdiction or whatever may happen. I have not any preconception on the subject, but the point of the matter is that I have to deal with it as strictí juris. Now until any of these equity petitions for receivers were actually filed in court I do not think there is any case pending under the rules or requirements which are made for our court.

Mr. Tuttle: The only reason I arose was my friend said there was nothing before the Judge, and that form of expression——

The Court: No. I understood he said "filed".

Mr. Franklin: I said filed. There was not any action pending, because the petition had not been filed.

Now, if the Court please, on August 26th, 1932, when the bill of complaint of American Brake Shoe was filed, together with an answer thereto of the Interborough Rapid Transit Company consenting to a receivership, the following rule was in effect in this court. This is the rule that has already been referred to twice in the second order. This reads as follows:

"11-A. All applications for the appointment of receivers in equity causes, in bankruptcy causes, and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the Judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge."

Now this rule was published in the Law Journal on July 9, 1932.

The Court: I was just wondering: of course it was a supplementary rule. It was not in the printed book. Go on.

Mr. Franklin: I wanted to point out that this rule has subscribed thereto the names of the eight District Judges.

The Court: I remember when it was passed. It was passed, signed, promulgated and published.

Mr. Franklin: Now the bill of American Brake Shoe and Foundry Company and the answer were not submitted to the District Judge who was holding the Motion Part on the day of submission, but was rather presented in the first instance to Senior Circuit Judge Manton. As I understand Judge Patterson was sitting in the Motion Part that week, and he was given no opportunity to consider or pass upon the application in any way. Coming now to the second of the orders, it is my understanding that there was no disagreement among the District Judges in the matter of division of business or assignment of cases for trial, and that, therefore, there was no occasion for invoking Section 23 of the Judicial Code which specifically states that the Judges may agree upon a division of business and assignment of causes, but in case the United States District Judges do not so agree——

The Court: "They." You are interpolating a parenthesis of your own?

Mr. Franklin: Yes. "In case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies, shall make all necessary orders for the division of business."

The Court: In other words, that section apparently contemplates the function of the Senior Circuit Judge as a peacemaker among the District Judges.

Mr. Franklin: Exactly. Exactly. That has occurred in one case in 14 Federal 2d——

The Court: Case against the United States?

Mr. Franklin: Yes. Case against the United States.

The Court: I know that case.

Mr. Franklin: Now in my study of the case I have looked upon this designation really as following the second order, although it was read first, and that is why I put it that way.

The Court: Yes, but he would not have been a District Judge in order to create the disagreement until he had been designated by himself to be a District Judge.

Mr. Franklin: Yes. You see in the first paper, which is called a designation, there they invoke a different section of the statute; what we call Section 18 of the Judicial Code.

The Court: Wait just a minute. Let me look at it. You are very familiar with it, you know. What section is that?

Mr. Franklin: Section 18 of the Judicial Code. It is also called Section 22 of the United States Code; Section 18 of the Judicial Code.

The Court: The first sentence of that provides "If the public interest requires the Senior Circuit Judge" shall assign one of his colleagues or any Circuit Judge to hold District Court.

Mr. Franklin: That is it. Now under the second order, getting back to it, what Judge Manton did in this case particularly was he recognized apparently that there was no disagreement among the eight District Judges, so it was his thought, apparently, or he thought what litigants thought, that the Senior Circuit Judge could appoint himself as an additional District Judge, and, having done that, that then he would declare that he disagrees with the other eight Judges and that is exactly what occurred in this case.

It seems to me that it does not require very much argument that if the right of that second order is to be based on the statutory provision which is quoted therein, that that would not be a reason, nor a sensible interpretation, because obviously the only purpose of the statute was to allow the Senior Circuit Judge, where a difference developed among Judges, to step in and make peace, so to speak, in dividing their business.

Now in the first order, the reference to public interest: it will be noted that Judge Manton states that he find the public interest requires. That apparently is based on a short affidavit that was filed by Mr. James L. Quackenbush at the time that the original bill and the answer were submitted to Judge Manton on August 26.

The Court: Now, be accurate. When you say "filed" you mean presented to Judge Manton with the original bill.

Mr. Franklin: That is right.

The Court: They had never gotten to the District Court at that time, had they? Is that in the papers somewhere?

Mr. Franklin: That is also in the big book.

The Court: What was the phrase used: "public emergency and public necessity?"

Mr. Franklin: I shall read it. It was very short.

The Court: No. I mean the phrase of the order.

Mr. Franklin: He finds that the public interest requires "that Martin T. Manton, a Circuit Judge of the Second Judicial Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a District Court within such Circuit". It is on page 27 of the book, Exhibit A to one of the affidavits.

You will notice, if the Court please, that it is stated on the second page, in the second paragraph,—I shall just refer to the pertinent provisions,—Mr. Quackenbush states that it is important and in the public interest that

2518 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

no receiver in the cause should be a trust company or any other corporation, but that the receiver or receivers should be an individual or individuals. I need not read the rest of it, and then a little further on, it is about four lines on, the affidavit continues: "That while in bankruptcy the appointment of a trust company as receiver might be advisable such is not the case in respect to a railroad of the size, importance and character of the defendant."

The Court: Laboring under the delusion that we have a rule requiring the appointment of the Irving Trust
2519 Company in equity causes. We are absolutely free in these cases to do whatever we want to do. Sometimes we appoint the trust company and an individual, and sometimes we appoint an individual.

Mr. Franklin: Absolutely, and it is my feeling that this was a proper case for the appointment of individuals.

The Court: Obviously.

Mr. Franklin: But the District Judge holding the Motion Part was never given an opportunity to pass on that, or to consider it in any way. Now it is possible that Mr. Quackenbush thought Rule 27 of the Bankruptcy Rules applied, which, however, where it is a pub-
2520 lic service corporation——

The Court: Of course. The public service corporation are outside of bankruptcy.

Mr. Franklin: So it will be noted that there was no reference in this affidavit of Mr. Quackenbush about this matter having been submitted to the United States District Judge. Conceivably if they had taken this matter up with the District Judge holding the Motion Part, and that Judge, after considering the matter, gave them informal advice that he would probably appoint a corporate trustee, notwithstanding their plea, there might in some way come in the question of public interest, but here is the case where the entire United States District

Court, and particularly the Judge assigned to hold that part was completely disregarded.

The Court: Well, of course, when you say "completely disregarded" that is not the point. The question is whether he had a right to deal with a case which was a case which had not yet been filed in the District Court, and, when filed in the District Court it would be subject to be entirely dealt with by the District Court.

Mr. Franklin: That is exactly our point. Now, if the Court please, there are, oh, there is a wealth of cases which it is hardly necessary to go into at this time——

The Court: Nothing is more terrible than a wealth of cases. Give me one or two of them.

Mr. Franklin: Yes, but on the point that a rule, properly promulgated by the United States District Court, will be recognized not only by the litigants but by the Judges, and by the Appellate Courts, and the United States Supreme Court has gone so far as to say,—this is in the case *Weil against Neary*, 278 U. S., 160,—that a bankruptcy rule of the District Court forbidding trustees in bankruptcy to retain as their attorney, the attorney for the creditors, had the force of law.

Another case, with which your Honor must be very familiar because of the wonderful record and experience which your Honor had before coming on the Bench, is the case of *Galveston Dry Dock & Construction Company* v. *Standard Dredging Company*. That is reported in 40 Federal, (2d), 442, where it was held that Rule 29 of the Admiralty Rules of the Southern District of New York had the force of law, and that reviewing courts were as much bound to observe them as a statute.

The Court: Did you gentlemen exchange your briefs?

Mr. Franklin: Yes, we have. We received them this morning. Now, if the Court please, here is a case, as we point out in our original bill, that involves literally hundreds of millions of dollars. If we go back a little

while, we recall the Seven-Cent Fare case involving the same companies, where, after spending hundreds of thousands of dollars, in counsel fees, the case was thrown out eventually and the State Court was allowed to take hold. I believe that is an experience most lawyers have had, and I think it is most essential that this matter should be determined at this time——

The Court: Correct practice is just as important in a case involving five hundred dollars as five hundred million, but, of course, everybody is aware of the importance.

Mr. Franklin: Very true, except in this case I want
2525 to add, your Honor, that the I. R. T. Company, for example, is collecting approximately five million or six million dollars a month, there are a great many things being done in this transportation system, so if they found that these receivers were not properly appointed, there would be no end of waste of funds and property and energies.

If the Court please, this was not the only rule that was violated. We claim not only a violation of Rule 11-A —but while I am on this point I would like to call your Honor's attention to the fact that even if there was no rule, it is my understanding that it has always been the practice in this court, certainly as far as I can remember,
2526 and that is almost thirty years, that equity receivership applications are presented to the Judge holding the District Court, and I say even if there was no such rule that Senior Circuit Judge Manton would not have the right to step into a situation and take hold of a case of this kind, and appoint receivers in the first instance. Now Rule 11-A——

The Court: Is that printed in the book?

Mr. Franklin: I think so. It is in connection with the employment of solicitors for receivers.

The Court: That is the equity rule regarding employment of solicitors for receivers? That is under the equity rules, is it not?

Mr. Franklin: That is right. Now I call your Honor's attention to the first part of that rule which reads: "No solicitor shall be retained by the receiver unless his affidavit annexed to the petition of the receiver shall show to the best of his knowledge, his business, professional or other connection during one year prior and up to the date of the affidavit, the subject matter of the suit, the parties, the solicitors for the parties, any creditor of the defendant or any other person interested in the case or in the receivership estate."

Now, Mr. Chadbourne——

The Court: Of course that equity rule is under the Judicial Code and we have to have it passed upon by the Circuit Court of Appeals. So that rule was passed upon.

Mr. Franklin: Of course that is not a calendar rule.

The Court: Not a calendar rule. It is an equity rule.

Mr. Franklin: We urge and set forth in our bill and supplemental bill that the appointment of the firm of Chadbourne, Stanchfield & Levy was irregular and improper in that it violated the Rule 11 to which I have just referred.

The Court: You mean that the affidavit——

Mr. Franklin: That the affidavit was insufficient.

The Court: Who made the affidavit?

Mr. Franklin: Mr. Chadbourne. It is page 35 in the copy of the book you have.

I call to your Honor's attention that in paragraph 2 of this affidavit Mr. Chadbourne says: "That several members of the firm——"

The Court: I just read it.

Mr. Franklin: Well, I simply call to your Honor's attention that it appears from the affidavit that his firm and several members of the firm had contact with numerous legal problems in connection with the traction matters in the City of New York.

530 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Now we show in our bill, or supplemental bill, that three days or so before the receivership application was made to Senior Circuit Judge Manton, that Mr. Chadbourne acted as special counsel for the Brooklyn-Manhattan Transit Company, at a conference had with the Transit Commission of the State of New York. I only mention that because that is definitely of record, and I think I can say, without fear of contradiction, that Mr. Chadbourne and his firm have been special counsel for the Brooklyn-Manhattan Transit Company, the chairman of whose board is also the chairman of the Interborough
531 Rapid Transit Company, Mr. Dahl. So that there was a very close affiliation of interest there which, in my opinion, barred that firm from acting as solicitors for proper receivers of that company.

In addition to that there have been several cases,—I do not believe there is any rule on the question that this court or that the Federal Court will not appoint as receivers parties who are intimately connected with a particular property, but that practice was only recently condemned by Judge Sanborn in the case of May Hosiery Mill *v.* The Grand Five-and-Ten-Cent Stores.

The Court: I have my own personal point of view
532 about that sort of appointment; people that are connected with an organization, in an equity receivership, I must say that I am rather inhospitable to it. I do not see how you can say it is not done. A president of a corporation is often appointed with some other receiver. I mean I think Judge Sanborn's case was rather——

Mr. Franklin: Rather a caustic opinion?

The Court: Rather a caustic opinion, and I say, with all due respect, that it was an opinion not based on the spirit that is prevalent in the great metropolitan centers.

Mr. Franklin: Yes. If your Honor will let me read from one or two cases on the point. This is the case of

Finance Company *v.* Charleston Railroad Company, reported in 45 Fed. 436. There the Court held, page 438:

> "Unless in cases of imperative necessity, no person will be appointed receiver of a railroad company who is a party to, or of counsel in, the cause."

Now the receiver who was appointed for the Interborough Rapid Transit Company, rather one of them, is Victor J. Dowling, who was a member of the firm, or associated with the firm of Chadbourne, Stanchfield & Levy. We felt then, and we feel now, that it was improper to appoint as the receiver of this property a member of the law firm that had been doing work for that very company, and I believe that Judge Manton himself recognized this, because after Judge Dowling returned from Europe, I may say at the time of his appointment he was in Europe—after he returned Judge Manton held up the appointment of Judge Dowling until he could be furnished with an affidavit from the Judge as to when he severed his association or relations with that law firm. Such an affidavit was furnished, verified on September 23rd, 1932. He was appointed on August 26, 1932.

I am not going to make very much of a point of it, but I want to call to your Honor's attention that immediately after he was appointed receiver, all of the newspapers in the City reported a conference, or a——

The Court: I don't care anything about that. I will tell you, Mr. Franklin, it seems to me that the only question that it would be appropriate for me to deal with really on these questions is the question of the legality of these appointments. Now if it should be determined that what Judge Manton did in coming down, so to speak, to the District Court, and putting himself into the district group, and then making these orders in his

536 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

other capacity as Senior Circuit Judge, about a disagreement, if that was a regularized procedure, and legal, and so forth, why then I suppose that what he did after that with regard to these appointments would be something that it might not lie in my province to interfere with. Suppose one of the regular District Judges appointed somebody else——

Mr. Franklin: I think in that case, if an appointment was made of that law firm and these receivers——

The Court: You would go to the Court of Appeals?

537 Mr. Franklin: Yes. We would probably have to take an appeal. And our bill sets forth the facts and we thought it was pertinent, and your Honor would be interested in knowing just what occurred.

Now we ask in our orders to show cause that the order appointing Victor J. Dowling as Receiver be vacated and set aside.

The Court: Of course, mind you, if the order of designation by Judge Manton constituting him a District Judge falls, the orders which he made subsequent to that would fall also. But they would fall for jurisdictional reasons; not for any reasons of whether he exercised his discretion rightly, or whether it was a wise appointment. I have nothing to do with that whatever.

538 Mr. Franklin: If the Court please, my thought was this: that since this effects and involves also a rule of this court that is, Rule 11 just referred to, that it was proper for this court, in considering the whole case, to also declare whether or not there was a violation of that rule in connection with the proceeding, and it was because of that that I felt it would be proper, simply because the bill asks for it, because the order to show cause referred to it, for your Honor to know just what happened in connection with the receivers. If your Honor decides, as your Honor may decide, that there was no authority for Judge Manton to act in the case, or to

make the designation, or to appoint the receiver, your Honor can limit the decision and probably would say that this makes it unnecessary for me to consider any of the other matters involved.

The Court: Oh, I see your point. Perhaps I did not grasp it before. You mean if it should be held that this appointment was legal, that is, jurisdictional, and there was no infirmity of jurisdiction in it, in that case then I would be in position to vacate the orders entered because they did not comply with the rule?

Mr. Franklin: No. I cannot claim that.

The Court: No. Of course not. It would be incredible.

Mr. Franklin: No, I would not contend that.

The Court: No. You would have a condition of chaos.

Mr. Franklin: No. It is well established in this court, and I think by rule, that once a Judge entertains a case and makes rulings, that he is in position to complete it.

The Court: It is a fixed rule now I understand.

Mr. Franklin: So I understand.

The Court: What we are seeking in cases of this kind is a meticulous orderly proceeding. That is what we are trying to arrive at with our new rules and that is one of the most important things in the world, because everyone knows how, when you have to go from one court to another, oftentimes a Judge is in Europe and somebody has to come to another Judge in one of his receiverships, and it is so inconvenient for counsel. There is a long story to be told and it is impossible, so that sort of thing is really individualized, and centralized, so to express it as much as possible so that the proceeding will run along between two banks. Of course if one is away in Europe or something of that kind that is another matter.

542 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Mr. Franklin: This will greatly simplify my argument, as I expected to tell the Court about some of the things that have already occurred, and really with the thought of bringing to the Court's attention some matters which I think now are unnecessary to show that there was collusion here; that this receivership was hatched months before the papers were filed; that these receivers and their attorneys and others knew about it, and I was going to submit certain facts which are now unnecessary.

The Court: Yes, but just *en passant*, since the Manhattan Railway receivership which my former firm ar-
543 gued in the Supreme Court, I do not see what you mean by collusion. I suppose if there was jurisdiction it makes no difference——

Mr. Franklin: Yes, but——

The Court: Do not let us go into that, but I say off hand that it does not seem to me it does make much difference.

Mr. Franklin: This is a matter we can take up at another time.

The Court: I am not deciding anything on it but I am saying let us get down to the only thing that I feel myself is judicial propriety for me to deal with, and
544 the only thing I feel I can properly deal with under the circumstances, and that is the sole question of the legality of Judge Manton's actions in those orders that he entered. That is the foundation of the whole situation.

Mr. Franklin: Certainly. If there was no authority there everything else necessarily falls with it.

The Court: And if there was authority there everything must necessarily stand. The whole thing is hinged; that is the pivotal point in the whole arrangement, and if you have any argument to make on those questions, illustrative, or on the theory of this Federal Judicial Code, or anything like that, I think that would be the

thing to deal with. It really seems to me that is all you can do. This is not, as you may imagine, by any means a very agreeable assignment for me, but because I am here, by agreement among the District Judges made last summer, last June, and I think all on file, whereby I am assigned to sit in the Motion Part this month, I am dealing with this matter, therefore, as an ordinary motion, and I think that you have to be meticulously careful in what I might call judicial manners, not to overstep what you should do, and consequently I am quite frank to say that that particular question, the jurisdictional question we will call it, although perhaps it is not properly described as jurisdictional, but that is an easy word that people think they understand is the one that we should confine ourselves to only and I will hear anything more that you want to say about that.

Mr. Franklin: First I want your Honor to understand that it is also difficult and embarrassing for a lawyer to present a matter of this kind because it refers to a high judge.

The Court: I quite agree that it is a delicate matter, and will have to be dealt with by all parties with the utmost good humor and wisdom. That is all there is to do. We will just have to deal with it that way. I am not criticizing your argument, but I say that we have plenty to do in determining that question and I do not want to have you go off on questions that I could not determine if I tried to.

Mr. Franklin: Then I would like to conclude my argument by pointing out, which is probably unnecessary, that we feel that there is an important issue here in that it is important,—unnecessary for me to have to tell it to this Court,—that there should not be any overstepping, as your Honor just said, from one judge on to another. In other words, that there should not be any usurpation by

a judge sitting in a different branch of this court. That it is of the greatest importance——

The Court: What do you mean by "different branch of this court"?

Mr. Franklin: Well, I mean a judge sitting in the United States Circuit Court of Appeals.

The Court: That is not a branch of this court. It is an entirely separate court. They were founded in 1912 and we were founded in 1789; entirely different courts.

Mr. Franklin: I make the point that it is just as important for this court to prevent encroachments on its
549 powers, on its duties as is the necessity for keeping separate the judicial and legislative functions, and I think that ought to be taken into consideration by your Honor, as your Honor undoubtedly will, in passing on the point.

Now Mr. Boehm is associated with me and he has filed an intervention. If it is agreeable I would like Mr. Boehm to take the argument at this point.

I wanted to say this: Our brief refers to a number, I should say 50 to 75, of cases that will require some analysis if questions are brought up. It seemed to me proper in this situation merely to give to the court as full a presentation of the facts as I could. If necessary we can go into the cases, although I believe on account
50 of the voluminous papers filed, and I think I have myself received a half dozen printed briefs this morning which I would like to reply to, that it would be probably not practical to attempt to determine even the legal questions without a fuller opportunity to study the cases.

Mr. Boehm: May it please your Honor: I think your Honor is entirely correct in stating that the only question involved upon this motion is whether or not Judge Manton had the power to make the two orders which have been referred to, and whether, as a result of the two orders that he made he had the power to entertain the application of the Interborough Rapid Transit Com-

pany, or rather the American Brake Shoe & Foundry Company, for the appointment of a receiver of the Interborough Rapid Transit Company, and subsequently to permit the intervention of the Manhattan Railway Company and the application in that action for the appointment of a receiver of the Manhattan Railway Company.

Now that power is based, in the first place, upon Section 18 of the Judicial Code, which says that the Chief Justice of the United States, or the Circuit Judge of any Judicial Circuit, or the Senior Circuit Judge thereof may, if the public necessity requires, designate and assign any Circuit Judge of the Judicial Circuit to hold a District Court within such Circuit. Now your Honor will notice that the qualification there is that the Senior Circuit Judge may designate a Circuit Judge if the public interest requires it. That does not mean a private interest. That means a public interest. That does not mean the interest of one particular litigant. It means the interest of the public. What is the interest of the public that required Judge Manton to sign the order designating himself as a Judge of the Circuit Court to sit to hold the term of the District Court? It is not claimed that there was no District Judge who was ready to hear the application for the appointment of a receiver in the American Brake Shoe case. It is not claimed that the Judge who was then sitting in the Motion Part was disqualified from hearing that application; that he was biased or prejudiced or interested. There is no claim that the public business was so great that he could not entertain that application as well as the other applications that might be made before him, and those are the only public interests that I know of that would justify the designation of a Circuit Judge to sit and hold the term of the District Court.

2554 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

What was the purpose of Section 18 of the Judicial Code in providing that the Chief Justice, or the Circuit Justice or the Senior Circuit Judge might, if the public interest requires, designate another Circuit Judge to hold a term of the District Court? Was it not obviously to facilitate and expedite the business of the District Court? That if there was no Judge who could hold any particular term of the Court that it was necessary to hold that a Circuit Judge, who might not be so busy, should be assigned to hold that part of the Court or that term of the District Court; or, that if a particular Judge was
2555 disqualified for some reason, a Judge of the District Court, from holding a particular term, whether by illness or any other reason, that some Circuit Judge might be called in to help in the expedition and the transaction of the business of the District Court.

That was the only purpose of this section of the Judicial Code. There was not anything else to do, and before Judge Manton had the right to designate himself and to make the order of August 25, 1932, designating himself to hold a term of the District Court, it must appear that there was some public interest that required it, and I challenge my distinguished opponents to state what public interest required Judge Manton to designate him-
2556 self to hold the term of the District Court.

It has been suggested by Mr. Franklin that possibly the affidavit of Mr. Quackenbush had something to do with it. I do not think so. I cannot see anything in that affidavit that had anything to do with making the application to Judge Manton, or Judge Manton directing that the application should be before him, or designating himself a Judge of the District Court. In the first place, it was a private matter. The parties were private litigants. It was not a matter of public interest.

In the second place, there was nothing that appears in the equity rules of the District Court which prohibits,

as your Honor has pointed out, the appointment of individual receivers of corporations of this kind, and I thoroughly concur with what your Honor has said, that we should have individual receivers of these companies, but what we want, and what we contend for, are independent receivers who are not dominated by the Interborough interests or the Brooklyn-Manhattan interests, but who are acting independently in the interests of the security holders of these companies and in the interest of nobody else.

Then the next ruling, the next order, that Judge Manton has made, and the rule under which he made it, Rules 1-A and 11-A of the District Court, I think Mr. Franklin inadvertently omitted to call to your Honor's attention Rule 1-A of the District Court rules. It provides that any Judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge. That is a rule of the Court unanimously concurred in by all of the Judges of the Court. In other words, the purpose of that rule was that nobody should step in and take upon himself the transaction of the public business of the Court, but that it should be done in an orderly way, and that the Senior District Judge shall be the one who shall assign the work among the Judges of this Court.

Then follows Rule 11-A which provides that all applications for the appointment of receivers shall be made to the Judge assigned to hold the Bankruptcy and Motion Part of the business of the Court and, "to no other Judges."

Those rules under the decisions of the United States Supreme Court have the force of statute. It is the same as though Congress had passed a statute, so far as the business of this Court is concerned, to the same effect as the rules adopted by the Court.

2560 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Now in order to obviate and circumvent these two rules, Judge Manton has made the following order: This one is entitled in the American Brake Shoe & Foundry case and the other is not entitled in any case at all except that in the first order he mentions the suit of the American Brake Shoe & Foundry Company which was not then pending.

The Court: This is another order, is it?

Mr. Boehm: This is another order I am about to refer to. Of course, I may say that I doubt very seriously in the first place whether a Circuit Judge has the
2561 power to designate himself to sit in the District Court. But, passing that aside, I also question whether he has a right, in designating himself, to say that a particular application may be made before him, not to hold the term of the court to hear all applications that may be made, but a particular application, namely, the application of the American Brake Shoe & Foundry Company.

That is another very unusual and strange provision of this order, and I doubt very much, aside from his right to make the order at all, whether he would have the right to say, "This particular case may be heard before me", and say "I am just going to hear this case," and that is all he has heard. There is no claim that any other case
2562 was brought to him as a result of this designation.

Now the other order that he made recites: "Whereas, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge," in that he says he is acting as District Judge. Personally I do not think he is acting as District Judge.

The Court: What page is that on?

Mr. Boehm: Well, it is on page 2 of that large book your Honor has before you.

The Court: Page 2?

Mr. Boehm: Yes. That order entitled, "American Brake Shoe & Foundry Company vs. Interborough Rapid Transit Company."

The Court: Is that the same date; August 25th?

Mr. Boehm: The same date. (Continuing reading:) "Acting as District Judge for the Southern District of New York." I doubt very much whether he was acting as District Judge. He is simply a Circuit Judge holding a term of the District Court. It is not important at all, but I think he must be acting as District Judge.

It is not very important, but assuming he is acting as District Judge: (Continuing reading) "does not agree upon the division of business and assignment of cases for trial in the Southern District of New York as provided in and pursuant to the rules of court for the Southern District of New York heretofore adopted by the then United States District Judges for the Southern District of New York."

The Court: Is this not the same thing I have heard before?

Mr. Boehm: Yes, sir; I am just repeating it so as to make my argument clear to your Honor.

Then it is ordered that for a period of thirty days all applications for receivers in equity causes may be made before him.

Now that order is based upon Section 23 of the Judicial Code, or rather, made in view of Section 23 of the Judicial Code which provides that in districts having more than one District Judge, the Judges may agree upon the division of business and assignment of cases for trial in said District, but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies shall make all necessary orders for the division of business and the assignment of causes for trial in said district.

566 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

What does that section mean? It means that should there be a disagreement among the eight Judges of the Court, so that the eight Judges of this Court can not agree among themselves as to how the business of the court shall be divided, that then the Senior Circuit Judge has the right to step in, and, in order to facilitate the orderly transaction of business of the court, and to prevent chaos in the transaction of the business of this court which would otherwise result if the Judges could not agree as to how they would divide the business of the court, that he is then permitted to step in and assign
567 the business of the court to the Judges.

The Court: What is your theory of the way such intervention is initiated?

Mr. Boehm: My opinion, my thought, is that the only way such an intervention may be initiated would be by the District Judges themselves going to the Circuit Judge and stating that "we can not agree as to how the business may be disposed of or divided, and we ask you, under this provision of the Code, to divide the business."

The Court: That is what was done in the Case v. United States, 14 Fed. (2d), where Judge Sanborn made an order dividing the Eastern District of Oklahoma in two divisions.

568 Mr. Boehm: Yes, sir. We have that case on our brief, your Honor, but it certainly never was intended that the Senior Circuit Judge might assign another Circuit Judge, or himself, as in this case, to hold a term of the District Court and then have him to say, "Now I am holding a term of the District Court and I do not agree with the Judges of the District Court as to how the business shall be assigned and divided. Therefore I designate that the application for the appointment of receivers in the particular case, and all other applications in that case, shall be made to me." If Judge Manton had the power to make an order of that kind he could just as

well yesterday have made an order designating himself to hold the motion part of this court, and directing that this application shall be heard before himself.

The Court: Well, of course——

Mr. Boehm: A question of propriety, of course, and he would have had the power if he had this power.

The Court: Power?

Mr. Boehm: I am addressing myself to power. And you will see to what an absurd conclusion such a theory could lead one; that he would practically have the right to step in and stop the business of the court and arrogate to himself the business of the court and the powers of the court. Well, that never was the intention of Section 23 of the Judicial Code. The intention of Section 23 of the Judicial Code was that the public business should be facilitated; that there should not be chaos; that there should not be disagreement among the Judges. The purpose of Section 23 was not to create disagreement, but to prevent disagreement and obviate disagreement, but Judge Manton has taken the very opposite to the purpose contemplated by Section 23 of the Judicial Code and he has designated himself to hold a term of the District Court, and, after having so designated himself, he has created that disagreement. So we say he has no such power; that that was not the intention of Section 23 of the Judicial Code; that it was not the purpose of Congress in enacting that statute so to create this disagreement where none existed, but that the purpose of Section 23 of the Judicial Code was to stop disagreement where it existed and to facilitate the transaction of the business of the court.

I think that sums up briefly—I do not want to make a lengthy argument here; unnecessarily so—but I think that sums up briefly the question involved here as to the power of Judge Manton. Of course if he had no power to designate himself; if there was no public interest which

572 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

required the designation of himself to hold the term of the District Court, that order was void and must be vacated.

The Court: Yes, but the second order of August 25th——

Mr. Boehm: And I was about to proceed to that. If there was no disagreement among the eight Judges of this Court as to the assignment of business and the division of business, and I challenge my opponents to assert that there was any such disagreement; if there was no such disagreement he had no right to direct that this ap-
573 plication should be made to him in violation of the rules of this court, which provided that the business shall be divided by the Senior District Judge, and which provided further that all applications for the appointment of receivers shall be made to the Motion Judge.

We claim that he had no power to make either of those orders. We claim that he had no jurisdiction to sit; that he had no more right to sit in this court and ascend this Bench and to hear this application than if some citizen from City Hall Park were to ascend this Bench and say "I will hear this motion acting as a District Judge." We say that he was absolutely without jurisdiction and without power.

574 The Court: I suppose he cannot be subject to criminal prosecution for impersonating an officer of the United States.

Mr. Boehm: No, it does not go as far as that, but if he was without power, all orders appointing the receivers and all the subsequent orders that he made in connection with the receivership are mere nullities. They are not made by the District Court at all. They are not made by a court of competent jurisdiction. They are mere pieces of waste paper and we ask, therefore, in view of the great interest, both private and public, involved in this situation that the District Court take jurisdiction of

this case where it properly belongs, and that it appoint independent receivers both of the Interborough and of the Manhattan.

And when I say independent, I mean independent of domination of any interests which might be inimical to the security holders of these two companies; independent of domination of the B-M T., which may have an adverse interest in connection with this situation; independent of the bankers who have been associated with this situation and whose acts may be questioned, and independent of any domination by anybody. In other words, we want receivers who are free to act as the merits of the situation justify.

Mr. Franklin: If the Court please, there is one point which I would like to call to your Honor's attention. It is in connection with our second order to show cause. If your Honor will examine the second order, that is the one other than the designation on pages 2 and 3——

The Court: The second order to show cause?

Mr. Franklin: Yes. The second order to show cause.

The Court: Who signed that?

Mr. Franklin: That was signed by Judge Bondy. I want to call to your Honor's attention that the order of Judge Manton of August 25th, on pages 2 and 3, specifically states in the first preamble, referring to his designation, on page 1, "Martin J. Manton has been designated", but at the end of that paragraph, "for a period of thirty days beginning with this day". In the order itself it is stated: "Ordered, adjudged and decreed, for a period of thirty days beginning with this day, all applications for receivers" and so forth, may be presented under Rule 11-A or to Judge Manton.

Now that order is dated August 25th, and thirty days from August 25th would be September 24th or September 25th, but, according to his very order his term of office, so to speak, or his term of new office, expired within that

thirty-day period, and yet, without any other designation, without any other order, on September 28th, after the expiration of the thirty-day period, Judge Manton made a sweeping order in which he designates himself; he extends the term for a period of at least three years and continues the receivership, and I think that point, too, merits your Honor's very careful consideration.

The Court: Well, I suppose that competence on September 24th continued over to September 28th; it would not be like the extension of a term of court. Perhaps he might only decide to visit the court occasionally and appoint himself on the occasion when he wanted to come down, so I do not think there is very much in that point. It does not seem to me so offhand.

Mr. Franklin: It seemed to me there should have been a designation and it should have been within thirty days when he is making the designation as Senior Circuit Judge. When he is making a designation as Senior Circuit Judge it does not make him a District Judge. I think the point should be mentioned. It is one of the irregularities that ordinarily finds one if we do not begin right.

The Court: We will now take a five-minute recess.

(Short recess.)

Mr. Tuttle: Before I proceed, if the Court please, I would like to amplify a response made by counsel in the matter of dates. It is the fact that the two orders referred to, the order of designation, and the accompanying order, are dated August 25th, but your Honor will observe from the large printed book, they too, were filed on August 26th.

The Court: Yes. I have the originals.

Mr. Hobbs: May I interrupt Mr. Tuttle a moment. Do I understand your Honor wants to hear all of those in favor of taking the jurisdiction of this court——

The Court: I shall deal with these things quantitatively.

Mr. Hobbs: I would rather wait until I hear anything to be said by the other side.

The Court: If there is anything to be said in reply, I will give you a chance.

Mr. Tuttle: We have a number of points which we desire to present for your Honor's consideration, which we think go to the heart of the matter, and I will present as the first one the proposition that Judge Manton had ample power, ample jurisdiction, to designate himself as provided in the order of designation, and that in consequence the reasons, or, indeed, if we take the other side's phraseology, the propriety of his so doing is not open for consideration here, but would be a subject which might be considered by appropriate action in that matter, and may be an appeal.

The Court: You mean that if he recites that there is a public interest involved that it would not be for me to go behind that recital?

Mr. Tuttle: That is it. The statute—and it can be very briefly stated, because I know your Honor perceives it—the statute gives to Judge Manton as Senior Circuit Judge the jurisdiction and the power to decide, judicially, the question of the public interest. He decides that, and in so doing he acts judicially. The question as to what his reasons were; the question as to the sufficiency of those reasons, may possibly be a subject for consideration, although I should doubt that, by an appellate tribunal. Certainly it is not the subject of proper consideration by a Judge sitting in a coordinate, if I may use that phrase here, a coordinate office, because, of course, Judge Manton, designating himself as a sitting Judge of the District Court, becomes coordinate with the other Judges sitting there.

Minutes of Hearing Before Woolsey, J., October 6, 1932.

Now we can illustrate that by calling attention to the fact that the statute provides that the Chief Justice of the United States may act similarly, and I think that that reduces the argument on the other side almost to *reductio ad absurdum;* that to suggest that if the Chief Justice of the United States, for reasons satisfactory to himself, believed that the public interest required him to designate Judge Manton or any other Judge of the Circuit Court to sit in the District Court, that the propriety of his action could be inquired into by a District Judge. In other words, the proposition comes down to this: that Judge Manton, in his capacity as Senior District Judge, is, by express provision of the statute, given both ample jurisdiction and ample power, and it is for him to decide, and his decision is a judicial one, and consequently cannot be open to collateral attack elsewhere.

The Court: How can it be a judicial decision if it is arrived at outside of argument and without any proceeding of any kind? I should say that it was the exercise of administrative discretion which, quite possibly, would not be disturbed. I would not call it a judicial act. I think what we are dealing with here is administration rather than judicial acts.

Mr. Tuttle: By the term "judicial" I meant in his capacity as Senior District Judge——

The Court: Oh, yes.

Mr. Tuttle:(Continuing)—in the exercise of the judicial powers which accompany that office, and which he possesses. Now, furthermore, it is to be observed in this connection that this is no isolated instance of action on the part of the United States Circuit Court of Appeals Judge at all; not only in this Circuit, but in practically all the other Circuits of the United States has similar action been taken from time to time by the Senior Circuit Judge, and, indeed, in many of them, as I will point out in a moment, the Senior Circuit Judge has desig-

nated himself, not for all purposes, but for the purposes of hearing a particular controversy or litigation or subject matter. In other words, I am pressing the thought that under authority of this statute there is ample precedent of the highest kind for precisely the action which Judge Manton took in order number one.

The Court: You tell me that that is so, and I accept it on the face of what you say, but do you mean there are reported cases on it?

Mr. Tuttle: I do not wish your Honor to take it on my say-so, but I am going to give you the precedents right away.

In the first place, we have in printed form the affidavit of Mr. Nicholls, and if your Honor will be good enough to turn to page 21—not in the brief, but in the printed affidavit of J. Osgood Nicholls, page 21 of that—you will observe on page 21 an order which was made on January 17, 1913, by Judge Lacombe as the Senior Circuit Judge, an order made in a particular action, so entitled, the venue being in the United States District Court even, and the recital being that in his judgment public interest requires that all motions and other proceedings in that action be determined before himself sitting as a Judge of the United States Circuit Court of Appeals, Second Circuit, in which said District lies, and "I do hereby designate and appoint Honorable E. Henry Lacombe, a Judge of the United States Circuit Court of Appeals for the Second Circuit, to hold the United States District Court for the Southern District of New York for the purposes of hearing and determining all motions to be made and the final hearing to be had, and all other court proceedings in said suit."

If your Honor will be good enough to turn the page, you will find a similar order in what obviously is a counterpart suit, made by Judge Lacombe on the same day.

The Court: I was just looking at that.

590 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Mr. Tuttle: Now if your Honor will be good enough to turn to page 27, you will find an order made by Judge Waddill, as Senior Circuit Judge of the Courth Circuit, designating himself to sit in the District Court for the purpose of hearing and determining a particular matter therein specified, to-wit, a matter of the removal proceedings against Manville H. Sprague.

We have collected, both in the affidavit and in the annexed papers, other instances. These show in themselves that according to the practice of this Circuit, and according to the practice of other Circuits, this order has
591 plenty of precedent.

The Court: That is the designation order?

Mr. Tuttle: Yes, sir. I am talking of the designation order. It is stated in the affidavit that in the Fourth Circuit, the Senior Circuit Judges in the same period of time have appointed themselves sixteen times to hold a District Court, and in three of said instances the designating orders have designated the Senior District Judge to conduct proceedings in specifically named suits.

In addition to that, as our affidavit shows, taken from the records in this Circuit, there have been designations made by every Senior Circuit Judge since Lacombe's
592 time, of himself to sit in the District Court; Judge Rogers, Judge Ward and Judge Manton, and Judge Hughes, and, in addition, if your Honor will look at page 26, of the same printed book, your Honor will observe a general designation as late as March 20, 1930, by Judge Manton of himself to sit practically for all purposes, and, of course, that order has been in force and effect at all times since, and was in force and effect on August 25th and August 26th, 1932.

Now a notable instance of such designation, as a precedent in this case, a notable instance of designation in this very Circuit, is that of Judge Lacombe designat-

ing himself in the Metropolitan Street Railway receivership.

That phrase, "if the public interest requires", our friends on the other side say they are entitled to have some other Judge investigate into that question. I think we have given reasons why, in sound law, it can not be done, but I believe we have a precise authority on that point which is set forth at page 25 of my brief, and is a decision by the Circuit Court of Appeals for the Fourth Circuit, in which there is express reference in the course of the opinion to the fact and to the law that it is the judgment of the Senior Circuit Judge that must control 25
under the circumstances.

The Court: That is exactly what I say. I should think that the designation order might very well be regarded as an exercise of administrative discretion that was given to him by the statute, that we might not be able to override.

Mr. Tuttle: It is on page 23 of my brief. Now in this connection it is important to have in mind that it has been decided by the Supreme Court of the United States that the Circuit Judge so designated does not thereby become a District Judge, as such, but he becomes a Circuit Judge and remains a Circuit Judge sitting in 259
the District Court.

I will call to your Honor's attention, as you have the brief open at that spot, to page 22 of it; the decision of the Supreme Court of the United States in Craig *v.* Hecht, 263 U. S., 255, where Senior Circuit Judge Ward designated Judge Manton to hold a District Court of the United States for the Southern District of New York, and you will see set forth there the terms of the designation. The Supreme Court did not question the sufficiency of the designation, but in referring to the capacity or character in which Judge Manton, a Circuit Judge, sat, there was the statement that "We agree with the

2596 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

court below that he was exercising the powers of the District Court. He was not a District Judge, but Circuit Judge assigned" in the words of the statute "to hold a session of the District Court."

Now that consideration may, and I think will, be important in the further development of my argument.

Before I leave that point, it says that when any of the conditions mentioned in Sections 13, 14 and 20 or any other conditions arise, "which in his judgment so involve the public interest as to require the designation of another Judge to hold any District Court." Your
2597 Honor has in mind that the Judge is acting, in the sense in which I use the term, in a judicial capacity. That is, exercising a judicial power conferred upon him by statute as Senior Circuit Judge.

Before we leave this particular point I also want to emphasize the fact that both sides do agree, at least, on this, that because of the peculiar character of the interests involved, the extent of the vital public concern, the interest possibly of the municipality it all indicates that a public interest was involved and that a receivership was vitally necessary. I will take to illustrate that the papers which have been served by the other side. This is their
2598 own petition.

The Court: That was a public interest, but that cannot go to the recital of public interest in the designation order. Are you going any further than that or do you say that is the end of it as far as I am concerned?

Mr. Tuttle: I say that is the end of it, but I am reinforcing, in view of the fact that they apparently now, if I understood—perhaps I misunderstood their argument—have challenged Judge Manton's power to find facts which would justify him in giving a certificate of a public interest, and I am simply——

Mr. Franklin: May I say he is not reading from the Johnson petition. This is a petition filed by Mr. Boehm.

Mr. Tuttle: I am reading from the Johnson petition, too, if counsel will give me a chance.

The Court: Wait a moment. He saw a yellow sheet there and he came to the conclusion——

Mr. Tuttle: It is yellow. I read from paragraph 19, from the petition of the intervenor, Benjamin Johnson, in the Johnson suit, and it says that the intervenor is imperatively required to ask for the time being a receiver to take charge of and continue the operation of these railroad systems for the accommodation of the public; to collect and receive and properly appropriate the income thereof until the final decree of the court, and in the petition of Johnson himself we find, in paragraph 8 the statement that the public interest is seriously involved in most, if not all of the issues raised. So we have this basic thought on which all parties agree; that a receivership was necessary; that insolvency was imminent, and that the protection of not only the rights of innumerable creditors to the extent of hundreds of millions of dollars, were involved, but that the interest of the public itself was vitally concerned, and it may be—of course I can not speak for Judge Manton—but it may be that Judge Manton felt that in view of the unprecedented size, the vast extent of the manifold interests and the interests of the municipality and the public itself, that it was appropriate that the Senior Circuit Judge, Chief Judge of this Circuit, should assume the responsibility of exercising the direction of that receivership. I say it may be that that was the consideration in his mind.

Now I pass to my second proposition, which is somewhat involved in the argument that I have already presented to you; that Judge Manton had proper jurisdiction over the Brake Shoe case by virtue of his designation. I have given you the precedents from this Circuit and the precedents from other Circuits, of specific designations for the purpose of hearing particular, and spe-

cific, suits, and I also say, in further development of that thought, that the statute plainly embraces such a designation. It cannot be said, by anything in its terms, to be limited solely to a general designation. The greater includes the less. There is absolute and complete power given here to make a designation for all purposes, and that means for any purpose.

The Court: Well, after he had descended from the upper court and made himself a District Judge for the time being, do you contend that he was as such District Judge, independent of the rules of the District, and could do anything that he wanted to, irrespective of whether they consent, without talking to them, or without doing anything about it? Does he go as far as that? It is a question of law that I am talking about. And after he denudes himself from the Senior Circuit Judge position and becomes a District Judge, is he in any better position than the rest of the other eight of us to do anything contrary to our own rules?

Mr. Tuttle: In the first place, your Honor has asked me several questions, I think, in one, but taking them in order, our contention as to his capacity is that he sat precisely as is described by the Supreme Court of the United States in the Craig case. He sits as a Circuit Judge holding a District Court.

The Court: Does a person who is a Circuit Judge holding a District Court have any different position than any other District Judge holding a similar position except that he has had more experience and has a bigger salary?

Mr. Tuttle: It may well be, and for reasons which I was going to advance in my third point. I have stated that he had complete power to designate himself, statutory power, which cannot be inquired into in a collateral proceeding. That is the first point. I am saying as my second point that he had proper jurisdiction over the

Brake Shoe case, and now I come, as the third point, to the consideration of the second order made by him and its bearing upon the applications of what have been described as Rules 1-A and 11-A.

In the first place I will present to your Honor the thought that if there had been no other order than the first order; if the first order alone stood, together with the designation of himself on March 30, 1930, to which I have called your Honor's attention; if the first order stood alone without the second, the proceedings which Judge Manton has taken would have been equally valid, irrespective of whether the second order was entered or not. 260

Your Honor has already read the second order, and of course it is not necessary for me to repeat that, but turning to these rules——

The Court: Well, but I think myself, with the result of this argument as it has developed itself in my mind, that the second order is the one to which most attention should be given, because we had a regular agreement, as we always do, as to division of business, and unless it is contemplated that a Senior Circuit Judge can come down and create disturbances and differences and disagreements, instead of sitting to straighten them out, I do not see why our rules dividing our business under the statute, would not control him, so that after he had gotten down there he would have had to go under the minimum requirement, to Judge Knox and request of him, in his capacity as Senior District Judge, to be assigned to this place, to sit in the motion part of the court. I should think that might be the minimum requirement. I am talking about orderly proceeding and rights. The question of power is a different thing. It is only the right to exercise a power that can validate these orders, and if the power was not rightly exercised, and it was an abuse of power, the orders, of course, would not stand, 260

and that is the thing, as I hear this question discussed for the first time, that gets into my mind all the time. How can a man go down, with the most beneficent intentions imaginable and create a disagreement which has not heretofore existed, and the disagreement has to be among the District Judges. It is not the District Judges and the Circuit Judge, because you have to play the limit. You cannot take just one case and dislocate the arrangement the District Judges have made by agreement among themselves.

Mr. Tuttle: I was about to say——

The Court: I am about to stop. I want you to talk to that point.

Mr. Tuttle: I do not wish your Honor to misunderstand me. We believe that this second order was entirely within the Judge's power and that it was entirely proper. I am saying, however——

The Court: You mean that the second order was a proper exercise of power?

Mr. Tuttle: Yes. I am saying, however, that I do not feel that the second order is necessary to sustain the action which has been taken here. I simply say that it adds a second bulwark to that action, and, following your Honor's thoughts——

The Court: I think that the second order looks as if it was an obvious effort to escape from the otherwise inescapable situation of being in the District Court as a District Judge and having been faced with those rules 1-A and 11-A, and then having come down there and finding those rules, they were hurdles which would necessitate his, under Rule 1-A, conferring with Judge Knox, and in that way getting into the motion part, and if he contended that the only person to whom the application could properly be made would be to the motion Judge—I mean how do you get away from it? After all, they are the rules, and there they stand. They are valid rules,

and I do not see how anybody can come down and just brush them aside. We are talking about the orderly administration of justice. That is the thesis I am offering you to maintain. I want to hear how you can brush these things aside. What is the use of these rules if anybody can come in and override them?

Mr. Tuttle: It is not a matter of brushing them aside. That is not the thought we have in mind. I would like to develop two theses before your Honor.

The Court: Yes. I want to give you all the time you need.

Mr. Tuttle: I am very glad your Honor gives me the 26
thought that you have in mind, because I can press my argument more intelligently, knowing that.

In the first place, just to state our position first, and then develop the argument afterwards, I am saying that I do not regard the second order as essential to sustaining what has been done. I am saying, however, that we support the second order and believe it an additional bulwark in support of what has been done, and then your Honor, in your observations here, made a statement which, if I got rightly, I venture not to agree with, and probably I ought to state that now, and that is that you stated that if there was power, but there had been an 261
abuse of power——

The Court: Yes.

Mr. Tuttle: ——the order should be vacated.

The Court: Yes.

Mr. Tuttle: Now that might be true in the action in which the order was made, or it might be true of a doubtful exercise of power, but we very respectfully challenge the power of another Judge in another action, simply because he assumes or comes to the conclusion, that a power which exists has been abused, to vacate that order. And I will address myself later on to precedents and authorities to that consideration.

The Court: Of course the nexus between this proceeding and the other proceeding is that each of them has the same defendant, and that defendant in which these plaintiffs in these cases own securities, is in the hands of persons who, whether rightly or wrongly, the plaintiffs say, they do not want to leave them with, and I believe, so far as the *locus standi*, as far as these orders are concerned, you would be dealing with a technicality. That is the way I look at it.

Mr. Tuttle: I hope your Honor will not reach that conclusion at the present time.

The Court: I am saying I am only throwing that out to you to shoot at. You see, in the last few days since we arranged to have this argument, I have naturally been thinking about this case, insofar as I knew anything about it at all, and about the rules and about the orders and I have wondered very much indeed on all those points you mentioned, and I want to be corrected if I am wrong in saying that when A and B have agreed that B should go into a receivership, and then C, D and E who own securities in that same defendant B, also dislike for whatever reason, the people who have been appointed receivers of B, why are not they entitled in this case to challenge them, because under the equity rules they could not intervene in the equity case without subordinating themselves to that proceeding. Whatever other remedy have they got, if there is a remedy? There is the property of which they are aliquot owners and it is jeopardized, they believe, by what has been done. After all there is the Manhattan Railway, and the Interborough, both of them defendants, both of them in the hands of receivers. Why on earth can not these people come in with this independent suit and challenge the existence of that receivership on the ground that it was not based on a proper exercise of a judicial act?

Mr. Tuttle: I want your Honor to understand in the first instance that historically at least, it is not a correct assumption that they did not have power to intervene in the proceeding before Judge Manton, because these very counsel, on behalf of clients whom they represent in this very action, did intervene before Judge Manton; were permitted to do so, and that they made application for the appointment of other receivers in that very proceeding, and that that was denied. It was not until it was denied, and had been denied for some time, that they brought forward this proceeding seeking, and I say it with all due respect, to put your Honor in the position of 26
reviewing an exercise of power by Judge Manton. And our proposition is, and we do maintain this most strongly, that it is not before your Honor to determine whether or not Judge Manton properly exercised the power. The utmost that would be before your Honor would be to determine whether or not he had the power.

The Court: I did not say they had the power to intervene. I said if they did intervene they had to subordinate themselves to that proceeding, and, therefore, could not challenge the proceeding——

Mr. Boehm: I would like to correct the statement made by counsel.

The Court: I do not care about that. I have been 261
interrupting you too much, probably, Mr. Tuttle, but I think a matter like this is more of a conversation than a set speech for fireworks. It is better.

Mr. Tuttle: Judge, I left all my fireworks behind.

The Court: I know you have. Proceed.

Mr. Tuttle: Now, addressing myself to that thought, which is obviously fundamental in your Honor's mind, I want to go back in the first instance to these rules themselves. There are two classes of rules, and I think your Honor has already pointed that out.

The Court: I?

620 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Mr. Tuttle: Yes, sir, because you, in answer to something that was suggested by the opposing counsel stated that certain rules were equity rules.

The Court: The equity rules, yes.

Mr. Tuttle: Would have to be passed upon and approved by the Circuit Court of Appeals, before they were in force and effect.

The Court: The other rules did not have to.

Mr. Tuttle: I will call to your Honor's attention, while we are right on that, the language which makes that so, so that we can see what is the content of rules
621 which, to be effective, have to be passed upon by the Circuit Court of Appeals. Now I have the statute, and that rule of the Supreme Court set out——

The Court: It is not in the Judicial Code, is it?

Mr. Tuttle: I have it right in my brief, if your Honor will look at my brief. If your Honor will open the brief at page 28, you will find that I have collected there the statute and the Supreme Court rule which is for your Honor's consideration:

"The District Courts may, from time to time"—and then I ask you to note this—"and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under Section
622 730 of this Title, make rules and orders directing the return of writs and processes", etc., and practically covering the entire matter of practice and government by rule.

There are two conditions. One is that they shall not in any manner be inconsistent with the laws of the United States; second, or with any rule prescribed by the Supreme Court under Section 730 of this Title. Of course those exceptions would be implied even if they were not there. The Supreme Court of the United States has held over and over again that the rule-making power is not a power to abrogate or change statutes, or abrogate or change rules prescribed by the highest court under competent jurisdiction.

The Court: Do you seriously contend that that is an equity rule within the meaning of 11-A?

Mr. Tuttle: No, that is just the initial statute. I am now calling your Honor's attention to Section 731. Now you will notice that the content and scope of that statute covers not only the filing of pleadings, the taking of rules, the entry and making of judgments by default, and other matters in vacation, but otherwise regulating their own practice as may be necessary and convenient for the advancement of justice. Their own practice.

Now Section 730, which immediately follows that on the same page prescribed that, "the Supreme Court shall 26
have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the District Courts."

The Court: That is quite true. I just have had to deal with this whole question of equity rules in a case 262
I decided last July, and I am quite familiar with that, but what I want to get at is, how do you make out 11-A if that under the practice is an equity rule?

Mr. Tuttle: I am just putting down the planks in my platform. I have two in my platform now.

The Court: I see. Come on across.

Mr. Tuttle: The third is the rule adopted by the Supreme Court of the United States pursuant to Section 730, and is equity rule 79, which says that "With the concurrence of a majority of the Circuit Judges for the Circuit, the District Courts may make any other and further rules and regulations for the practice, proceed-

2626 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

ings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same."

I cannot conceive that in giving that rule-making power in an equity case the language could be broader than that.

The Court: Well, I can.

Mr. Tuttle: It covers anything from the practice——

The Court: Practice does not mean going around and getting an application for a receiver. It means the proc-
2627 esses and things of that kind, that are issued to get jurisdiction over people, and I should think that, for instance, if I was sent up to sit in the Customs Court and try an equity case, as I was this last Spring, and I sat there for some weeks, I should suppose under your construction that the Circuit Court of Appeals would have to permit me to go up there in order for me to have valid authority. This is a calendar rule. It is a general rule. It is not an equity rule.

Mr. Tuttle: If the Court please, I am contending this: first, that this Rule 11-A is in effect a rule which falls within the very subject matter of Section 730, and then I am making the further contention that even if it does
2628 not, even if your Honor wishes to call it a mere practice rule and outside of the scope of the word "practice", in Rule 79——

The Court: No. I did not say "practice". I said calendar rule.

Mr. Tuttle: I am saying that even if, for purposes of practice on the calendar, or calendar practice, you wish to consider it as not falling within the word "practice" in Rule 79, the same result follows, and I would like to develop these two——

The Court: Let me ask another question. If that is an equity rule, is our rule for pooling on calendars

and having a Judge sit in equity and a Judge sit in crime and a Judge sit in jury cases, is that an equity rule, too?

Mr. Tuttle: If it is an equity case.

The Court: If it is an equity case it is an equity rule?

Mr. Tuttle: Yes.

The Court: If it is an admiralty case it is an admiralty rule?

Mr. Tuttle: Yes.

The Court: I do not think that is right. I would not be so positive about that if I had not spent two weeks this Summer on this very sort of subject. I would not say so. No. I am not ruling with you on that. I do not say it is final, but——

Mr. Tuttle: I am trying to present to your Honor this thought: that whether it is an equity rule or not, that is the contention I am advancing; whether it is an equity rule or not, the position we have here is a sound one. We claim that it is an equity rule because it deals with an equitable case, and an equitable subject matter, and falls precisely within the language of equity rule 79 for which there is competent authority, and Section 730.

Let us take it the other way. Assuming it is not an equity rule and is not within Section 79 or Section 730. Let us call it simply a calendar rule for the governing of the calendar, and then we will come to what I have been trying to bring forward as my third proposition here: whatever authority then, there would be for such a rule would have to be found, of course, in Section 27, Title 28. It has already been referred to by counsel, and it is set forth on page 24 of our brief.

Now then we have this situation: we have a statute which in so many terms permits a Senior Circuit Judge to designate himself, or any other Circuit Judge, to sit and hold a District Court for all purposes, or for any special purpose which he may designate, and that statute

says that during the period of service of any Judge designated or assigned under this Chapter, he shall have all the powers and rights and perform all the duties of a Judge of the District Court. He therefore has before him, so designated, the question of whether or not he will agree to the rules which have been adopted by other District Judges. In addition, with this further consideration, that he himself has, by an order dated in March, 1930, designated himself to hold a District Court for all purposes. His name has never been signed to those rules. He took no part in adopting them.

533 The Court: It does not make any difference. He had no right to take any part in adopting them. He is just a *pro haec vice* Judge. You do not mean to say if all the Court of Appeals Judges were assigned to the District, that they would do it. Judge Mack did not take any part in it and he is not assigned to the District Court.

Mr. Tuttle: Here we have a statute, Judge, which gives a Judge so designated all the power and all the rights of a District Judge. See what it would lead to my adopting rules——

The Court: Excuse me a minute. What would it lead to, then; you would say that all of our rules not having been adopted with Judge Manton's consent are 534 subject to his approval and because he did not approve of them he could disregard them?

Mr. Tuttle: On the other hand, and with equal force, it could be suggested that so far as equity causes are concerned, indeed other causes too, it would be possible by a rule to entirely prevent a Senior Circuit Judge, designating a Circuit Judge, or one of his associates, so as to have any effective jurisdiction in the District at all, and thereby, in effect, repealing and abrogating that statute. If it could be done in this limited sphere, it could be done in the broader sphere, and, consequently the Circuit Judge would have no power. He would be entirely

dependent on Judges of a lower court as to what jurisdiction he might have, and what matters he may hear, whereas this statute confers a power upon him, as a Senior Circuit Judge, not dependent in any way upon the will or limitations which the Judges of the lower court may seek to impose. It would be in effect, and I say it with all due respect, not so much a stepping down by Judge Manton into the District Court, as a stepping up by the Judges of the District Court into the Circuit Court of Appeals, and saying to the Senior Judge there, "You shall exercise your statutory powers only in the way which we will prescribe by a rule."

Now, if the Court please, you will notice, if you examine closely, this section 27 that it says "In Districts having more than one district Judge." That is, the Judges of the District Court.

The Court: Certainly.

Mr. Tuttle: (Reading) "Upon the division of business and assignment of cases for trial in said District; but in case they do not so agree the Senior Circuit Judge of the Circuit in which the District lies, shall make all necessary orders for the division of business."

The Court: All right. That is perfectly clear, and that means that if the District Judges cannot live together and cannot arrange things among themselves then they can ask the Circuit Judge to straighten it out. Is not that what it means? That is what happened in the case of Case against United States.

Mr. Tuttle: That is all the statute says, and therefore I come back to the propositions which I advanced in the first instance, that these rules, Rule 1-a and Rule 11-a, have no application at all, and are no limitation upon the exercise, by the Senior Circuit Judge, of the broad power given to him. They apply only to the actions of the District Judges among themselves, and not to any determination that he may make that the public interest requires

a specific subject matter to be heard and determined in a given way.

The Court: Well, what is the orderly process then, I ask you again, when he comes down and appoints himself a District Judge, and finds himself in the District Court, and perhaps for the first time sees the rules of the District Court, what is the orderly procedure to follow? To change like Proteus into another form and become Senior Circuit Judge again and declare that he has reported to himself that he disagrees with the other Judges, and therefore he is going to straighten out the disagreement?
2639 That is not orderly procedure surely. He certainly would not have to talk to Judge Knox about it and see what should be done?

Mr. Tuttle: May I, with all due respect submit, then, that to say that is not orderly procedure really begs the question.

The Court: You say so.

Mr. Tuttle: The real fundamental question is what power he has to determine what his procedure shall be.

The Court: You mean he could determine just what sort of procedure he wanted to follow irrespective of any District Court rule?

2640 Mr. Tuttle: That is what these other Senior Circuit Judges have already done who have specified a particular matter to come before them.

The Court: How do you know? Suppose there was no such rule then as now?

Mr. Tuttle: I have not the slightest doubt that at the time these orders were made with reference to specific subject matters there was a Judge sitting in this Circuit at a particular part which, in ordinary course, would have heard that application if it had been presented to him. I have no doubt at all that what might be determined orderly procedure, as governed by the common practice would, in each one of those cases have been to

take that matter before the Judge sitting at the proper District Court.

The Court: But there was not any such rule as 1-a and 11-a at that time, and there is now. That is the whole difference.

To my mind,—of course I may be wrong about it, but that is the way it strikes me,—there you have something that you have absolutely fixed, and that was the reason, the contemporaneous construction of the situation, that lead to the second order declaring a disagreement, because if it was not for the rules I do not see that we would have had the second order at all. The second 26 order referred to disagreement, and inasmuch as the agreement which is on file here and now before me between the Judges as to their allocation of business, by which each person has his own business given to him during the summer, and also during this coming court year, all signed and agreed to, that fitted into these rules. I must say I cannot follow your——

Mr. Tuttle: May I ask your Honor this: after the designation has been made by the Senior District Judge of himself, or one of his associates to sit as a District Court, is your Honor of the preliminary thought that he then and there is lacking of the powers which every other District Judge has? A. Namely, the power to assent or 264 dissent.

The Court: I am, yes. Absolutely.

Mr. Tuttle: Why, the statute which governs this thing gives to him all the powers.

The Court: Oh, yes. The District Judges agree among themselves, if they agree. Nobody else has any right to impinge on them at all. That is my view. I do not think there is anything to argue about on that question. It seems to me so. I may be quite wrong about it, you know.

Mr. Tuttle: The effect is what I have tried respectfully to point out: that it is in effect limiting an express

statutory power given to the Senior Judge of the District, with all the responsibilities of that office, to make a designation, not only for all purposes, but for specific purposes, and to hold a District Court as such. The statute gives him all the powers and all the rights, and yet the conclusion which your Honor would suggest, would mean he did not have all the powers, and did not have all the rights.

The Court: No. It simply says he can designate to sit as a District Judge. That does not say he can designate himself to be the District Court on the question of
2645 rules and all that. If he comes in as a District Judge he has to conform with our rules as lawfully made. That is what I think.

Mr. Tuttle: I think your Honor has not stated the full statute. The full statute says that during the period of service of any Judge designated and assigned under this chapter he shall have all the powers, and rights, and perform all the duties of a Judge of the District or a Justice of the Court. Now then these rules that have been referred to here are merely the record of an assent between certain District Judges. They would not be binding on any Judge who did not assent.

The Court: Oh, I do not agree. If the majority of
2646 them did I think they would be binding.

Mr. Tuttle: Oh, no, Judge. You cannot say that is the statute.

The Court: I cannot imagine being half slave and half free. You could not run a court that way.

Mr. Tuttle: But, if your Honor please, that is the very thing provided for in the statute; that one Judge may dissent, and then it is provided what shall happen.

The Court: Dissent where?

Mr. Tuttle: On the power to make these rules.

The Court: You are talking about Section 23?

Mr. Tuttle: Section 28 or Section 27 of the United States Code.

The Court: I have only the Judicial Code here.

Mr. Tuttle: It is on page 24 of my brief. That is the section I am talking about; the bottom of page 24 of my brief: "In Districts having more than one District Judge, the Judges may agree upon the division of business and assignment of cases for trial in said District; but in case they do not so agree——"

The Court: That is the division of business.

Mr. Tuttle: Judge, may I just make my statement?

The Court: Yes. Go on.

Mr. Tuttle: (continuing) "but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies, shall make all necessary orders." They do not say the power to decide is with the majority of the Judges of the court as you suggested, sir——

The Court: I was talking about rule making.

Mr. Tuttle: I am talking about rules 1-a and 11-a; whether we call them calendar rules or equity rules. I say if there was any authority for those rules it must be found in this section.

The Court: Oh, I do not think so.

Mr. Tuttle: Or else it is an equity rule, if it is not found in this.

The Court: It is in that other section; the power of the District Court to make rules.

Mr. Tuttle: Yes, but the District Court's power to make rules under this section is, by express limitation, confined to such limitations as the Supreme Court of the United States in equity rules may prescribe.

The Court: Oh, yes.

Mr. Tuttle: And they have prescribed, as regards equity rules that rules when made by the District Court will not be valid until passed upon by the Circuit Court of Appeals.

650 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

The Court: I do not think that is an equity rule. I do not think that section has anything to do with it at all. If you read ex parte Briggs, and those cases where they wanted to try the causes without coming from Casnovia, and they could not agree on working it out, there was a division of business.

Mr. Tuttle: I have already stated that I am willing to take either horn of the dilemma. We contend this is an equity rule because it governs the question of who is to try equity cases, and that is by every terminology an equity rule, but if we say that these rules relate only to
651 the matter of calendar practice, and therefore for some reason which I do not see, are not within Section 79 of the Rules of the Supreme Court of the United States dealing with equity cases, then we are driven back to this section 27 and I do think, and respectfully submit, that your Honor was entirely in error in suggesting that where one Judge disagreed he would be bound by the decision of the majority, because in this particular subject matter under that section, there is another body or power set up to determine what shall happen when there is disagreement, and, therefore there is no power in the eight Judges of the District to prescribe a rule of this kind and make it binding on all the Judges if one or more
652 of them, less than a majority, dissent.

The Court: Well, I do not agree. Flat on that. We will leave that. How much longer have you for your particular argument?

Mr. Tuttle: Of course my associates and Mr. Guthrie wish to speak.

The Court: I am not crowding you at all. It is quarter past one now. Would you like to take a little longer now?

Mr. Tuttle: I would just as soon or prefer to eat at this time, if that thought was in your Honor's mind.

The Court: All right. We are agreed on one point, then. We will adjourn until two-thirty.

(Recess until 2:30 p. m.)

AFTERNOON SESSION.

The Court: Mr. Tuttle, I have been working during the lunch hour and I have just read this case of Galveston Dry Dock & Construction Company in 40 Federal 2nd, and that was a case in which Judge Manton, Judge Hand and Judge Chase sat in the Second Circuit Court of Appeals, and Judge Hand wrote the opinion and he said the rule had the force of law and that the Circuit Court of Appeals were as much bound by it and as much bound to observe it as though it were a statute. 26

Mr. Tuttle: There is no question in our minds, Judge, that a rule competently passed under authority of statute has just the effect of a statute.

The Court: Then take your 1-A and 11-A; your attack on them is that they were not passed according to the statute, is that right?

Mr. Tuttle: Yes, and also the question of their application to a Circuit Judge of the Court of Appeals sitting under authority of another statute. 265

Let me just before I pass the ball to my associates, your Honor, lay before you some additional facts.

In the first place, to illustrate what seemed to me a *reductio ad absurdum* in the opposing position, I cite you Rule 1-A itself, which says that any judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the senior District Judge. That language of that rule is such as to suggest that it possibly anticipated a desig-

nation by the senior circuit judge of some Circuit Court judge to sit in the District Court.

The Court: Or a District Judge or any judge.

Mr. Tuttle: But it says any judge designated to sit in the District Court. Your Honor is not a judge designated to sit in the District Court. Your Honor is a judge of the District Court. And I say the language of that rule is so framed as to suggest, at least to the outsider, that it was intended to apply to a Circuit Court Judge designated to sit in the District Court.

The Court: Yes, or any other judge.

2657 Mr. Tuttle: Yes, but if there had been only in mind the District Judges, then I should think it would have simply have said that the District Judges should do such work.

The Court: We are not talking about the same thing. Supposing he had designated Judge Howe to come to sit in our court from Vermont. He was designated to sit here to help out. That means Judge Knox could determine how he would be most helpful; whether he should sit in Crime, the Civil Jury part, or what court.

Mr. Tuttle: I am pointing to the language of the rule which is comprehensive, which, I submit, is *reductio ad*
2658 *absurdum* in the opposing position, and that is this, that under that rule as it literally stands, if Circuit Judge Manton should designate himself, or any other Circuit Judge, it would be for Judge Knox to say whether he should transact any business or not; taking the wording as it stands it would be in the power of the Senior District Judge to entirely nullify the provisions of the statute which expressly confers upon the Senior District Judge the power to determine whether public necessity exists and to act accordingly.

And, secondly, I see I can put the same thought in another way, suppose in the opinion of the Senior Circuit Judge it would be important in the public interest

to designate three or four of the circuit judges, because of supposed pressure of business or otherwise, to sit as District Judges. It would be in the power, then, of the District Judges to adopt at that time a rule of this character simply because they are a majority and to say to the four Circuit Judges who are so assigned, "You are a minority. We will transact the business." I am not imputing any such thought to our judges here, but——

The Court: I understand. We have to play limits in matters like this to see what is there of importance.

Mr. Tuttle: Absolutely. I am only illustrating, and I am trying to bring home to your Honor the thought 266 that it cannot be contemplated, according to the power as it exists to delegate to any of the district judges the power to adopt a rule or method such as this to entirely nullify or to make it possible to nullify the express superior power, the supreme power, given to the Senior Circuit Judge in this District, to decide these questions in his own view of what the public necessity requires. So much for that.

The Court: I want everybody to understand that these questions are all being dealt with more, so to express it, in rem, and not in personam. We are dealing with the question of what the result of this would be, 2661 and not whether one person would go and do something or not go and do something. You understand that, don't you?

Mr. Tuttle: Yes. That is why I said I was not imputing such actions, if certain interpretations of the law took effect, and I say it is inconceivable that such results were intended, or could be possible; that the view that supports that must be erroneous fundamentally.

The Court: I am not so certain that I agree with you on that and it seems to me that the Senior District Judge ought to be able to arrange the business and if the other man has a right to designate someone to go there, after

he gets there why doesn't he come under the rule that the Senior District Judge says he should? You see you cannot be both a Circuit Judge and a District Judge at the same time. You have to be one or the other.

Mr. Tuttle: If your Honor's thought is so, then the Senior District Judge could say in effect, we do not want anybody to come down from the Circuit Court of Appeals to sit in our body. You go upstairs where you came from. And does not that illustrate at once the proposition that is overriding the express statutory power given to the Senior Circuit Judge?

2663 The Court: Yes, but this rule does not say he shall not do anything; it says he shall do such work as shall be assigned to him.

Mr. Tuttle: Such work only as may be assigned to him. That is my point. Now, it is under that rule, if the rule is valid to the extent that it has been suggested here that then, of course, nothing need be assigned to him, and in effect the access of the Circuit Judge to the District Court under the authority of that statute may be shut off. I am not quite clear whether I gathered from your Honor's remark—to take up another angle of this matter—whether I gathered from your Honor's remark this morning that you thought these so-called Rules 1-A

2664 and 11-A were passed under authority of Section 27 relative to the division of business?

The Court: Oh, not at all. You see the trouble is with us that I have the book which only gives the numbers of the sections of the Judicial Code and you are talking about the United States Code annotated.

Mr. Tuttle: Yes, sir. Section 27 of Title 28.

Mr. Pettigrue: It is Section 23, I think.

The Court: That is Section 23 of the Judicial Code and I have been thinking of that and talking of that. If I talked correctly on that basis I do not think that that has anything to do with rule making whatever.

Mr. Tuttle: Then, as I understand your Honor's position, so that we may all address ourselves to it, your Honor's position is that this is not a matter connected with a mere agreement to divide business as authorized by that section but, on the other hand, is under Section 731.

The Court: I think perhaps I can clarify it for you this way: My conception of the thing is,—I have been thinking it over—this way: that we have certain rules that we have adopted, and so far as I can see, entirely validly adopted; among them 1-A and 11-A. What we do in the division of business in the pursuance of these 26(rules is a matter of agreement between the judges. For instance one judge might say, "I would like to go to Europe in May but I have some assignments arranged later in the summer, so I would not have to sit during June" or something of that kind. That is what you would do under the set-up of the rules. The rules form the pattern of the thing, but then you go along and make your arrangement as to the division of business in the light of those rules and when you do divide the business, and when you do say that Judge Patterson is going to sit in the motion part in August, as was the case in this instance, why then you have him as the only judge who is competent to entertain receivership applications. 266'

Mr. Tuttle: Well, then, I understand your Honor's position to be that Rules 1-A and 11-A are not to be supported under that particular section.

The Court: Under division of business, I do not think that has anything to do with rule making under the law.

Mr. Tuttle: Then I assume your Honor's position is that the authority for them, as rules, would fall under Sections 731 and 730 of the statute dealing with rules of practice in District Courts and the regulation of practice in District Courts by the Supreme Court. Otherwise——

The Court: Yes, absolutely, and you see that in that way there are certain kinds of rules, equity rules, that you have to have, under the statutory enactment, Rule 79 of the Supreme Court, any equity rule submitted to the Circuit Court of Appeals. As to the other rules we are absolutely free.

Mr. Tuttle: Then our feeling would be that these so-called rules are either equity rules dealing with equity subject-matter, or else they must, of necessity, be by agreement adopted by the judges for the division of business. I can conceive of no other classification——

The Court: No, they are simply rules. That is all. A general rule of the court; that they can divide the business. It means that three or four people say they have certain business to do, and one says, "I will take Crime" and the other says, "I will take Civil Jury" and the other says "I will take Motions" and the other says "I will take Admiralty." But the rule is that when one does take motions, all applications have to be made to him.

Mr. Tuttle: As we are just talking colloquially why does it not come down to this, that it deprives, in effect it limits seriously the power of the Senior Circuit Judge to decide when public necessity requires him to act.

The Court: I do not think so.

Mr. Tuttle: Why, he cannot deal, then, with any particular subject-matter and say that that case or that particular subject-matter through public interest should be considered by and handled by one of the Circuit Judges.

The Court: That is right, but the statute says he can designate when to go to the District Court. It does not say he can designate when to go to the District Court with the portfolio of the case under his arm.

Mr. Tuttle: But it says "Public necessity." And a rule of this character worded as this is, we respectfully

submit, transfers all that construction, or the major portion of it, to the Senior District Judge.

The Court: You cited a whole lot of cases where Senior District Judges have designated themselves to try a particular case. Well, in all those cases until this one, there had not been any such rule as this in the District Court. That is one difference. And the other thing is that I question very much whether if challenged, such a designation would be an appropriate one. There is no reason why one should not designate himself to sit in the district, but whether he should designate himself to go there with a case is another thing entirely. I 26
think it is merely saying that the District Court wants to be master in its own house. Why shouldn't it be? It may want help. It may want somebody designated to come down and help it, but after you get your designation, why should not they be able to say we will use the designatee in the way that is most useful and valuable to them. We are evidently at quite opposite ends of the pole on the subject.

Mr. Tuttle: It does seem to us, most respectfully, that your Honor's viewpoint is entirely nullifying the controlling power, the supreme controlling power given to the Senior Circuit Judge and is, in effect, transferring
that power to the Senior District Judge who may or may 267
not wish to assign to the Circuit Judge so designated, any of the activities or any of the duties which causes the Senior Circuit Judge to say that there was a public necessity.

I do not believe it changes, except from the point of view of degree, the situation, to suppose a case where the designation was made by the Supreme Court Justice of the United States. In degree it illustrates it but it would in effect give the Senior District Judge,—this rule,—the power to say, whatever reason led you to believe the public necessity required the designation of a Circuit

2674 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Judge, that Circuit Judge is going to do only such business as is assigned to him, whether or not that business has any relation to the public necessity which causes his designation. That is the statement of the conflict as I see it.

Now, Judge, I do not want to trespass too much on your time.

The Court: No, I want to hear everything you want to say. I want to hear every facet of this thing.

Mr. Tuttle: Then I want to present one other consideration which is aside from what I have said. It has
2675 relation to a situation as to which I understood your Honor did not express any opinion, but put it up to me, as you said, to shoot at, and that is this, that under the statute there is the express, unrestricted power to designate a Circuit Judge to sit in the District Court. In other words, the office exists. The office is a lawful office. It is filled lawfully and I am saying that under those circumstances there cannot be a collateral attack such as is launched in this suit against the action of the judge filling that office, in the first place, because it is not possible legally to have an indirect attack of that kind, unless, indeed, you could show that the action of the judge was entirely without jurisdiction and entirely without
2676 power; and, in the second place, and a further reason to the same end, is that he at least would be under the authorities a de facto judge.

Let me illustrate with a couple of cases exactly what I mean, and then I will pass the subject to my associates who have been very patient.

The Court: You say a de facto judge?

Mr. Tuttle: I did not say Judge Manton is a de facto judge.

The Court: Oh, you mean acting as District Judge he would be a de facto judge or what do you mean by de-facto judge?

Mr. Tuttle: I say at least he would be a de facto judge. Let me illustrate exactly, because it is capable of presentation from the authorities. In the first place, take the first proposition I advanced. I am talking of 280 U. S.

The Court: Is it in your brief?

Mr. Tuttle: Yes, sir. It is page 16. The Grant case. It was contended there that the appointment of a Receiver in the Common Pleas Court of Ohio was improper for non-compliance with statutory requirements. In refusing to consider the contentions, the Court said by Mr. Justice Sanford what your Honor reads there:

"Even if the order appointing the Receiver was erroneous and might have been vacated in part in a direct attack, as upon an appeal by the Furnace Company, its validity was not challenged in any respect by the answer of Leach & Company in the District Court, which admitted the allegation that Grant had been 'duly appointed' Receiver of all the company's property. And plainly the validity of the appointment could not have been questioned by a collateral attack in another court."

The Court: Well, "collateral attack in another court?"

Mr. Tuttle: Yes, but the same rule applies as the cases show, to a collateral attack in another suit. This is, of course, not the Brake Shoe suit. This is another suit altogether.

The Court: Yes, but it is a suit against the party asking for the appointment of a Receiver against the very party bringing the suit in which the Receiver was appointed, in the Brake Shoe case, so that the *locus standi* of these gentlemen to be heard, as I have heard them today, is due to the fact that they are asking, as to the company in which they have stock, by way of owning securities, to have another Receiver appointed.

Mr. Tuttle: May I ask whether this would be a conceivable situation: Suppose your Honor takes such ac-

tion in this matter as you might determine to do. Suppose conceivably you vacate the order and appoint Receivers of your own. Suppose tomorrow some other stockholders in another suit, not before your Honor, start an action questioning your jurisdiction or the propriety of your exercise of it; suppose other stockholders, for example, should go into Judge Manton sitting in the District Court and he should say that your Honor was without jurisdiction or did not porperly exercise it? You spoke a little while ago of orderly procedure. See the chaos such a situation would result in, and that is the reason behind this rule that there may be a direct attack. Unless the order is absolutely void there may be a direct attack and that direct attack can only be in the suit itself. These people have that remedy.

The Court: How are they attacking it in the suit itself? If they intervened in the suit, they would be subject to the suit. They cannot be antagonistic to it.

Mr. Tuttle: They can intervene for the purpose of presenting to Judge Manton the question that he is without jurisdiction and should dismiss the bill.

Mr. Franklin: It cannot be done.

Mr. Tuttle: And if he refuses they can appeal. And there are any of those other remedies through writs which are familiar; mandamus and prohibition remedies. I maintain they can go into this suit, not for the purpose of adopting that suit, but for the purpose of challenging the jurisdiction. They do not have to intervene as plaintiffs; they can come into court and say, "We have an interest in this subject-matter. Your Honor is acting improperly here. You have no jurisdiction to affect our property in the way you are doing it, and we ask you to dismiss this bill and nullify all the proceedings." The judge will grant that or deny it. Interested parties who feel themselves aggrieved can appeal. There is no difficulty about that situation. Instead, for other reasons

altogether they undertake here to pit one court against another; one judge against another. And I am saying that this rule to which I have referred is a rule which is adopted of necessity, to prevent just that situation arising. It cannot be done collaterally in another action or in another court. The door is open in the action itself.

I will now go to the second reason why I said there could not be a collateral attack. That one which I referred to is under the de facto rule.

The Court: I do not see that other case; where you have any citations on that. I can quite understand that in another court it might not be possible, but in another case and in the same court, with the nexus between them of the same parties why is it——

Mr. Tuttle: If your Honor please, if it is not clear it is through some oversight, because I am aware of a multitude of these cases, having been through the same situation myself, and I can submit a number of cases to show it cannot be done collaterally in another suit.

The Court: Here is this Italian Star Line case.

Mr. Tuttle: Yes. Is that not such a case?

The Court: I did not think it was that kind of a case.

Mr. Tuttle: Both proceedings were in the same court, sir.

The Court: Yes, quite true, but it was not a challenge of jurisdiction. It was, as I seem to remember it, and hearing about it at the time, that the Italian Star Line sued the Shipping Board for malicious prosecution and sought to introduce the fact that a Receiver had been appointed here in some consent fashion, and as a basis for that malicious prosecution, and it was not a case where another party came in, the way they are doing here, and sued the same defendant and asked for other Receivers to be appointed in its stead.

Mr. Tuttle: The proposition is one, of course, which can be very completely demontsrated one way or the

other from authorities. If the authorities are not here I am going to ask leave to supplement them, because we have been through that proposition in recent litigation, and I know the principle not only applies to another court, but to another case where other parties are seeking to bring about an overthrow of what has already happened in the particular action. It must be so, because otherwise we would have this chaos to which I have alluded; this lack of procedure forced upon us.

The Court: Yes, but I always feel that no one more thoroughly believes in orderly procedure like that than I. I mean I feel that I am a stickler for it, but the question here is whether this original procedure was orderly and was appropriate and was proper, and whether it was not an abuse of power, and if an abuse of power or abuse of discretion, I suppose you can set aside an order, can't you?

Mr. Tuttle: That is the point, judge, which I tried to present before.

The Court: Mind you, I am not talking about setting aside the Receiver order, because that is something that would follow naturally. I do not pay any attention to the prayer to set that aside, because if this jurisdictional basis of it, whatever you want to call it,—power basis,— is all right, you would not have anything to do with the Receivership orders, and if it is not all right, the Receivership orders would fall of themselves.

Mr. Tuttle: Your Honor used the expression "abuse of power" and "abuse of discretion" as the basis for setting aside an order——

The Court: Oh, no, I said you can have an abuse of power as well as an abuse of discretion and I say if this was an abuse of power, why would not that be ground for setting aside the order as to disagreement?

Mr. Tuttle: Our proposition is, and we advance it with all respect and the fullest confidence, because I do

not think an authority can be cited to the contrary, that where there is merely an abuse of power, and not lack of power, no coordinate judge can set aside the order that has been made. The only remedy is to apply to the judge who made it, and made the record which demonstrates the fact, or else take an appeal.

Now that is fundamental in this case, because we are saying here that we are demonstrating that there is no lack of power in these orders that have been made. The power exists. Now your Honor says it was unseemly procedure or intimates that it might be regarded as unseemly, but that is as far from the question of jurisdiction as the North Pole. 26

The Court: I did not say exactly that. I said I believed in orderly procedure, and I did not want to do anything that was not orderly procedure, but the question here is not setting aside the Receivership orders but setting aside the original orders by which Judge Manton made himself District Judge and then created the Receivership. That is the question that bothers me.

Mr. Tuttle: We say those orders cannot be attacked in a collateral proceeding. Certainly they cannot be attacked thuswise unless the orders were absolutely void for an absolute lack of jurisdiction. If they merely represent an improper or erroneous exercise of jurisdiction, then there is no power, sir, in a coordinate judge to act as an appellate tribunal and override that. 26

The Court: But you are not acting as an appellate tribunal if you do that at all. It is not acting as an appellate tribunal. I do not see how that comes up at all. Here they say receivers have been appointed by a judge who by whatever forms he went through did not follow the rules of the court, and, therefore, was not a person competent to appoint them. That is what they really say, as I understand it.

692 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Mr. Tuttle: Yes, but to sustain that there has to be this proposition; several propositions: First, that those rules were themselves applicable to a judge so acting; and, in the second place, that they being procedural rules, a disregard of them, even if erroneous, is equivalent to lack of jurisdiction, and that last proposition, as the first, we challenge.

Now I do not want to trespass except to make just this one additional point as to what I said about the de facto rule. If your Honor will be good enough to turn to page 30 of our brief you will see there a case that
693 went to the Supreme Court of the United States where there was an utter failure to designate formally. There was no designation on file of the Circuit Judge who said in the District Court.

You will find two other cases where there was an irregularity in the designation, or the designation was to a district in which the Circuit Judge afterwards did not sit, as in the third case.

The Court: Was that the McDowell case?

Mr. Tuttle: Yes; and yet in each one of those cases, although on two of them the attack was made right in the action itself, the action which the judge heard, the holdings were that the judges acts were de facto because
694 the absences of formal designation or the mistake on his part of the district in which he was assigned to was a mere irregularity.

Now, just—I need not discuss the cases, they are right before you. Just in closing what I have to say in order that our position may be completed by me on the record, I want to say that there were certain other considerations —I am not going to expand them at the present time— that apply here.

Now, in the first place, we say that there is no equity in this bill anyhow, so far, at least, as the Interborough action is concerned, *Brake Shoe* v. *Interborough*, because,

in the first place, there is no consent by the Interborough to the appointment of the Receivers in this Johnson action. Johnson is in the position of a mere stockholder of the Manhattan. He is not a stockholder of the Interborough at all. The best that he could claim would be that by virtue of the guaranteed dividends on the stock of the Manhattan he was an unsecured creditor of the Interborough.

The Court: There have been Receivers appointed for Manhattan, too, haven't there?

Mr. Tuttle: Yes. The Receivers were appointed on intervention of the Manhattan at the time. And I need 26
not discuss that, because I know from a prior matter I had before your Honor that you are entirely familiar with the decisions of the Supreme Court of the United States that no bill for a Receiver can be presented by an unsecured creditor unless, indeed, there is the consent of the defendant.

The Court: That only goes to the extent of the relief that will be granted to him here, I suppose, doesn't it?

Mr. Tuttle: Well, the original action, the action in which Judge Manton entered his orders, was not a Manhattan action at all.

The Court: I understand. 269

Mr. Tuttle: Manhattan was not a party to it. It was simply the Interborough and the American Brake Shoe.

The Court: Manhattan did consent in that action, didn't it?

Mr. Tuttle: Yes.

The Court: And Interborough did too?

Mr. Tuttle: And thereby conferred the jurisdiction required by the Supreme Court decisions.

The Court: Interborough did also?

Mr. Tuttle: You mean Manhattan did also.

The Court: I asked you about the Manhattan first.

Mr. Tuttle: O, I did not catch that.

The Court: And in this case, of course, they have not consented.

698 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Mr. Tuttle: They have not consented.

The Court: I know.

Mr. Tuttle: So we say that does not go just to the relief that they may obtain, it goes to the very essence of the bill itself under the decisions. An unsecured creditor cannot apply for equity jurisdiction of this character because the jurisdiction without consent rests upon certain interests which an unsecured creditor does not have. It is only when there has been a return nulla bona and then the court, to aid the execution, takes an equitable jurisdiction. Without that there is no equitable juris-
699 diction unless, indeed, it assents, says the Supreme Court of the United States. The absence of jurisdiction—can we press that consideration, your Honor?

The Court: And is that in the case too?

Mr. Tuttle: I am putting it in my brief. Yes, it is in the brief.

The Court: Oh, it is in the brief?

Mr. Tuttle: Or at least it was in the draft of the brief I saw last night. I have not seen the brief as finally printed.

Mr. Pettigrue: It is taken out.

Mr. Tuttle: If it was taken out it is put back again.
700 Now, can we call attention to the fact that there is no compliance here with Equity Rule 27, which has to do with a suit by stockholders seeking equitable relief.

Your Honor will, of course, bear in mind, finally, that we are here in response to an order to show cause. We have not answered, we have not appeared generally in this action of Johnson and the intervenors.

The Court: You say that the causes of action are not joined?

Mr. Tuttle: Under Equity Rule 27, no. That is the one we have here.

The Court: 26?

Mr. Tuttle: The one about stockholders' suits?

The Court: I have it; yes.

Mr. Tuttle: The only allegation that is here in issue is simply this: "On information and belief that the plaintiff herein, Benjamin F. Johnson, is a resident of Winchester, Kentucky, and a citizen of Kentucky and is a record holder of 100 shares of defendant Manhattan Railway Company, hereinafter called Manhattan Company, having a par value of $10,000."

And that is now at the time the bill is filed. There is nothing said about when he got it or whether he had it before the acts of which he now complains took place, and therefore I say there is the lack of compliance with 270
that. I also again repeat that we are here in response to an order to show cause, presenting the cause which we have, and that we have not filed an answer and have not as yet generally appeared in the action.

Now with those observations I ask your Honor's permission to turn the argument over to Mr. Guthrie.

The Court: You have not generally appeared yet?

Mr. Tuttle: No, sir.

The Court: You haven't come up to that?

Mr. Tuttle: No, sir.

The Court: You have been served with process?

Mr. Tuttle: Yes, sir.

The Court: You have not appeared? 2703

Mr. Tuttle: I am told we are served with process.

The Court: And you will have to appear. It is taken pro confesso. You are here in court.

Mr. Tuttle: Well, we would have to appear generally if this action is based on adequate jurisdiction. We of course are contesting that question.

The Court: You mean it will have to amend to comply with 27?

Mr. Tuttle: Not only that this bill itself on its face does not show the equity, but we take the position which

?704 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

I have been arguing during the morning, that complainant cannot come into this court.

The Court: That is the locus standi question?

Mr. Tuttle: We say that we would be entitled to present these considerations on special appearance in answer to the order to show cause. Now, may I assign the argument over to Mr. Guthrie?

The Court: Yes.

MR. GUTHRIE'S ARGUMENT.

?705 Mr. Guthrie: If your Honor please, Mr. Tuttle has so fully covered the various points that I must ask leave to repeat some of the arguments which he has presented. I shall devote myself particularly to the designation of the Senior Circuit Judge and the effect of the rules which this court adopted on June 30th and which are identified as Rules 1-A and 11-A.

Now, there is no question as to the binding effect of those rules on the District Judges, who entered into the agreement, whether those so-called rules were adopted under Section 27 of the United States Code, Section 23 of the Judicial Code or under the general powers of the ?706 court to make rules that is conferred by statute.

If, under Section 27, there is an agreement as to the division of business, we urge that such division of business is not binding upon the Senior Circuit Judge when duly designated to hold a District Court. If it is treated not as a division of the business and a distribution of the trial of cases and the entertaining of motions, then we say that these rules were not properly adopted because, in the first place, not concurred in by a majority of the Circuit Judges, if treated as rules in equity, which we assert they are essentially. And if to be treated as general rules under the powers of the District Court to make rules for the regulation of the business of the court, then

that those rules are inconsistent with the statutory provisions to which I am about to call your Honor's attention again and with the provisions of the Equity Rules prescribed by the Supreme Court under authority of Section 730.

Now, if your Honor please, I think it is as well that we should understand at the outset the status of the Senior Circuit Judge when duly designated to hold a District Court.

Does he thereby become a District Judge, or does he simply thereby become entitled to hold a District Court, with all the authority and jurisdiction of a District Judge 270
in holding that court? The Supreme Court of the United States has authoritatively declared that when the Circuit Judge is designated to sit under Section 22 of the United States Code, and I am always using the numbering of the United States Code, but I will use the numbering of the Judicial Code as your Honor prefers.

The Court: Well, it is a little easier on the Judicial Code for me, because that is the only one I have here.

Mr. Guthrie: Well, then, when designated under Section 18 of the Judicial Code. Let me read, even if it is repetition, what the statute says with regard to the power and authority of the Circuit Judge under certain circumstances. Section 18 provides that: 270

"The Chief Justice of the United States or the Circuit Judges of any Judicial Circuit or the Senior Circuit Judge thereof may, if the public necessity require it, designate and assign any Circuit Judge of the Judicial Circuit to hold a District Court within such Circuit."

And to repeat what the Supreme Court of the United States has pointedly decided, that he does not become a District Judge but that he continues a Circuit Judge authorized to hold a session of a District Court.

Now, what are the powers conferred on that Circuit Judge so designated? A. The statute reads:

2710 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

"During the period of service of any judge designated and assigned under this chapter, he shall have all the powers and rights and perform all the duties of a Judge of the District Court or a Justice of the Court to which he has been assigned excepting the power of appointment to a statutory position or a permanent designation of newspaper or depository of funds."

And again the statute provides in Section 19 as follows:

"It shall be the duty of the District or Circuit Judge as designated and appointed under either of Sections 17
2711 to 22 of this title to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district."

And of course that means before the District Judges of the said district.

The Court: I was just wondering, have you got an extra copy of your brief?

Mr. Guthrie: Certainly.

2712 The Court: I had one, but I misplaced it. If I had another one, it would be easier for me to follow you.

Mr. Guthrie: (Handing copy to the Court.)

The Court: Thank you very much.

Mr. Guthrie: Now, if your Honor please, I suppose it is unnecessary to repeat to you the language of the Supreme Court in the Washington-Southern Company case in 263 U. S., where the unanimous opinion of the Court declared, at page 635:

> "But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true whether the court to which the rules apply be one of law, of equity

> or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred."

And I shall shortly argue that, taking your own Honor's construction of these rules or these provisions as rules under the general rule-making power of the court, they are in practical effect so, not to mention intent, but certainly practical effect tend to restrict the jurisdiction conferred by statute upon a Circuit Judge so designated under Section 18 of the Judicial Code. 271

Now, we contend, differing in that from the view expressed by your Honor, that Section 27 of the United States Code, or Judicial Code, Section 23, deals with the particular subject of division of business and the assignment of causes, and we say that the rules which your Honors have formulated deal with the division of business and the assignment of causes. That is the subject matter of those rules. And therefore, having been dealt with by a particular statutory provision, they no longer come under the general rule-making power of the court conferred by some other general statutory provision.

On the other hand, to repeat, if these provisions or rules 1-A and 11-A are rules and do not derive their authority from Section 23, which provides for the agreement of the District Judges in respect of the division of the business of the court and the assigning of causes for trial, then they violate the provisions of the statute to which I shall shortly refer. 271

Now, for purpose of argument, may I not analyze your rule 1-A. You have the statute conferring the broadest powers and jurisdiction upon a designated Circuit Judge, and you have here a provision, whether you call it a rule of court or an agreement, which provides that a Judge so designated shall do such work only as may be assigned to him by the Senior District Judge.

2716 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Now, your Honor intimated this morning that the minimum which, in reasonableness, this would require, would be an application or a request from the Senior Circuit Judge so assigned, to the Senior District Judge. For what? I answer it. For permission to do any work in the court which he is authorized to hold by statute, or to exercise any jurisdiction which is expressly conferred upon him by statute.

How striking the words are, "He shall do such work only as may be assigned to him by the Senior District Judge."

2717 In other words, he can do nothing as a Judge, he can exercise none of the jurisdictions conferred upon him by statute, he can exercise none of the judicial powers, he cannot hold a District Court as expressly empowered by statute to do, unless the Senior District Judge sees fit to grant him permission.

Now, under so-called Rule 11-A, this Judge who, by statute, is authorized to hold a court of equity, who by the express language of the statute as emphasized by the Supreme Court of the United States in its opinion in Craig *v.* Hecht, to hold a District Court sitting in equity, that Judge so designated and so vested with jurisdiction

2718 by statute, can not entertain an application for the appointment of receivers in equity causes.

Of course, if your Honor please, the fact that these provisions were denominated rules as distinguished from agreement, the fact that they were the essence of agreement among the Judges, the eight Judges who made them, is immaterial. If they were made under Section 23 of the Judicial Code, which is 27 of the United States Code, the authority for them was the agreement of the Judges among themselves, that is the District Judges, not to make rules binding on their successors; not to make rules binding on a designated Judge, but an agreement among themselves, binding upon them, that if they could not

agree to the proper division and distribution of the work of the court, then the Senior Circuit Judge could intervene and determine what the division and what the assignments should be.

It seems to us that the clear intent and purpose of Section 27, or 23 under the Judicial Code, in the light of the conflict between the District Judges in regard to the trial of cases and, sometimes, their inability to agree, that the essence of the intent and purpose of Section 23 was to authorize the District Judges to agree among themselves on the division of the work of the court, and if they were not able to agree among themselves, then 272
the Circuit Judge should assign them to the various parts and make the necessary divisions of the work of the court.

The Court: Well, in that Case v. United States, the District Judges there submitted the question for division to Judge Sanborn, and isn't that the normal procedure, if they cannot agree?

Mr. Guthrie: I think, if your Honor will look at that case again, you will see that there was there a statute of Congress which confirmed the division of the districts as made by the Senior District Judge.

The Court: Later on, yes, but that was a later case 272
that came up the following year, ex parte Briggs, as I recall it, but this one here——

Mr. Guthrie: My recollection of the case is that the Act of Congress preceded the case of Case v. United States.

The Court: No, I think it preceded it, a very extraordinary situation there that I have not been able to gather even from the record that I read at the Bar Association. This finding of Judge Sanborn is that whereas the Honorable Williams and Kennedy, District Judges, did not agree upon the division of business, the assignment of cases for trial in the District, and have submitted

2722 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

to the undersigned as the Senior United States Circuit Judge of the Eighth Judicial Circuit the question of such division. It is perfectly evident that the Judges agreed to disagree and said, we will leave it to Judge Sanborn to settle.

Mr. Guthrie: Well, you will notice that that case dealt with the geographical division.

The Court: Oh, yes, they split it into two divisions.

Mr. Guthrie: And that is hardly analogous with the present case, and hardly an authority bearing upon either aspect of the question which is before your Honor, name-
2723 ly, whether these rules were adopted under Section 23 or under the general rules of practice.

The Court: That is only one of the questions. The other one is, when you have Section 23, you ought to separate the request to deal with the division of business, or that comes from the District Court, normally, at least—of course you can conceive that there might be some situation that initiative might have to be taken by the Senior Circuit Judge, but I should think that normally it would be the other way.

Mr. Guthrie: There was a suggestion this morning of the possibility of the disturbance of the business of the Court, the disruption by reason of disagreement among
2724 the Judges, whether regularly appointed or specially designated. It seems to me that that was contemplated by the statute and when they vested the power in the Circuit Judge to supervise the execution of that agreement, the subject was dealt with.

There was no occasion to deal with the subject of an agreement between the Circuit Judge designated to hold a District Court in the District, and the other or regularly appointed District Judges, because the statute fixed the jurisdiction and the powers of a Circuit Judge holding a District Court and the other Judges in that court at the time, the regularly appointed District Judges could

not, by any agreement among themselves, or by any rule that they saw fit to adopt, restrict or limit the jurisdiction of that Circuit Judge so holding a District Court.

The Court: Let me ask you one or two questions, Mr. Guthrie. It is perfectly obvious that the Circuit Court of Appeals is an entirely distinct court from the District Court, that is true, isn't it?

Mr. Guthrie: There is no question about that.

The Court: Now, the arrangement of the first twenty-three sections of the Judicial Code provides a somewhat plastic arrangement as to personnel, but I think if you read those over you will find that there is a certain condition precedent that has to occur, whether it is a case of the Senior Circuit Judge going down to the District Court, or a District Judge being asked to go up to the Circuit Court of Appeals, because they often are asked to sit up in the Circuit Court of Appeals when they need extra assistance. Now, the point of the whole thing is, when there isn't any disagreement among the District Judges, because that is something that I can take Judicial notice of myself, obviously, and also which is perfectly beyond challenge. 27

Mr. Guthrie: There is no question about it.

The Court: Now, how does the operation of Section 23 ever commence if there isn't a disagreement among the District Judges? It seems to me perfectly incredible that a person can designate himself, a man who is really intended by Section 23 to be a peacemaker between District Judges, could designate himself and thereupon create a disagreement and then, in view of the disagreement, say that he was re-allocating the business, as he would have the power to do, if the condition precedent of disagreement among the District Judges had occurred. 27

Mr. Guthrie: I am not suggesting, under the language of your second rule, which I think was unfortunately

728 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

worded, I am not suggesting that the Senior Circuit Judge can create a disagreement.

The Court: Well, that is what this order says.

Mr. Guthrie: You are not dealing with what the order says, but you are dealing with substance, not with words; you are dealing with the power of the Senior Circuit Judge, and the statute vests jurisdiction in him to hold a District Court, and you can not take that jurisdiction away from him by agreement of the District Judges. That is our position.

729 To repeat, the order, whether it is a rule or an agreement or under the authority of Section 23 of the Judicial Code, and 27 of the other, is wholly immaterial. The essence of our contention is that the District Judges can not agree among themselves to clip, to lessen, to limit, to curtail the power of a duly designated Senior Circuit Judge who is vested with the jurisdiction conferred by statute.

The Court: What business have counsel got to go with a District Court case to anybody except a District Judge?

Mr. Guthrie: I would not say that that may create confusion. It has not in the past. The confusion will
730 only be created because of these new rules. But if you say it creates confusion, that is an argument addressed to Congress. You can ask for the repeal of these statutes conferring the power and imposing the duty upon the Senior Circuit Judge, if designated, to hold a District Court and to exercise all the powers of that Court granted to him by the statute.

Now, if your Honor pleases, we are of opinion that this division of business is not within the purview or scope of any rule making power, that it is clearly the intention of Congress to confer the power of agreement upon the District Judges themselves personally, and if they are unable to agree, then the supervisory power of

the Senior Circuit Judge comes into play. We find no case where this section has been considered by the courts in the aspect in which it is presented to you today for determination, but we find a case, which we have printed upon our brief, in Montana, where substantially the same situation was presented, where there was a provision of the statute authorizing the Judges to agree in regard to the division of business, and another provision of the statute authorizing them to make rules, and the court held that the division of business was a matter personal to the Judges, that it was not binding upon their successors, that it did not come within the purview of the rule 27
making power, and the case concluded, "Because the distribution of business is personal to the Judges, it is not a subject within the purview of court rules, and Rule No. 2, adopted in 1905, while effective as the expression of the will of the Judges in office at that time, is not binding upon the present Judges."

The next point that I desire to take up with your Honor is that this is, if a rule——

The Court: If this is a rule?

Mr. Guthrie: If these rules, so-called Rule 1-A and 11-A, are to be deemed rules, they are essentially rules in equity, because they provide for the regulation of the 27
court of equity especially directed to the consideration of causes and applications for the appointment of receivers in equity, and if so regarded they are invalid, because, as suggested by your Honor this morning with regard to equity rules governing the practice in equity in the District Court, the District Courts cannot make any rules without the concurrence of a majority of the Circuit Judges for the Circuit.

Last year, when you dealt very fully with the revision of rules, including equity rules, the records of the Court show that you obtained the concurrence of a majority of the Circuit Judges. We fail to find any record of any

concurrence whatever of a majority of the Circuit Judges to these rules 1-A and 11-A which, if they apply to equity causes, if they apply to applications to a court of equity for the appointment of receivers in equity, are, from our point of view, clearly rules in equity.

Now, analyze the present rules in equity as prescribed by the Supreme Court of the United States. You have here a rule that a Judge authorized to hold a court of equity under Sections 18 and 19 of the Judicial Code, that is a District Court sitting in equity, you have a rule applicable to the rule 6, that the Judge may at any time
2735 and place and on such notice, if any, as he may consider reasonable, make and direct or annul orders, rulings and proceedings, and is competent to hear all causes; and you have also under Rule 79 that the District Court may make additional rules, provided they secure the concurrence of a majority of the Circuit Judges for the Circuit.

Therefore, if these are, as we earnestly submit they are, rules in equity, because they govern applications for receivers in equity, because they attempt to govern the work of the equity judge so designated, because they restrict and curtail the jurisdiction conferred upon him by the statute, we submit that if valid at all, they could only
2736 become so if the District Judges had procured the concurrence of a majority of the Circuit Judges in this Circuit.

I now take up the other aspect of the rule-making power. Where does this Court get its power to make rules, if not in the old provision of the Revised Statutes contemporaneous with the organization of the Court, now known as Section 731:

"District Judges may from time to time and in any manner not inconsistent with any laws of the United States or with any rule prescribed by the Supreme Court under Section 730"—I am reading from page 17 of our brief.

The Court: Yes.

Mr. Guthrie: (Continuing) "The District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." 273

Now, we say that those rules are inconsistent with sections 18 and 19 of the Judicial Code, vesting full jurisdiction in a designated Circuit Judge, and that they are inconsistent with the rules of the Supreme Court under section 730, because they clearly regulate practice in equity; they prevent the Judge so designated from exercising any jurisdiction in equity unless the Senior District Judge sees fit to grant him permission to exercise that statutory jurisdiction.

The Court: I do not think it clear that they can't practice in equity. It is just indicating the place where you must go to practice when you have equity. 273

Mr. Guthrie: Well, your Honor said it was a rule—you called it, with all deference you called it a "calendar rule". I don't care what kind of a rule you call it, or conceive it to be, you get your power to make these rules from Section 731, and you cannot make a rule which, in practical effect, would restrict and curtail the power conferred by statute upon a duly designated Judge.

The Court: That is the part that I can't follow you at all, Mr. Guthrie. I can't follow it at all. A man is designated for the District Court, and there he goes to the court, and that court has its rule. Why isn't he subject to those rules? That is what I can't understand. He is not superior to them.

Mr. Guthrie: Well, then, that is for Congress.

The Court: He is designated to that court.

Mr. Guthrie: No. He is designated to hold a District Court. You may say well, what is the difference. Well, the Supreme Court thought there was a difference in the Craig case, emphasized the difference.

The Court: What did they say?

Mr. Guthrie: They said that he was not a District Judge but a Circuit Judge assigned to hold a session of the District Court. The statute says that he may be designated as assigned to hold a District Court, not to
2741 sit in the District Court, but to hold a District Court.

The Court: All right.

Mr. Guthrie: And then it goes out of its way——

The Court: Well, then, if he holds a District Court in this District, doesn't he have to do it under the rules of this District?

Mr. Guthrie: You say rules?

The Court: Yes.

Mr. Guthrie: If those rules——

The Court: Under the valid rules of this District, we will say.

Mr. Guthrie: Valid, of course, if those rules are not
2742 inconsistent with the jurisdiction conferred; but if those rules are mainly such as to prevent him exercising that jurisdiction, could you imagine anything more highly calculated to restrict the jurisdiction of a Judge than to provide that he can only do such judicial work as some other Judge may permit him to do?

The Court: I don't know. I think that is a very salutary and sensible rule when you have a great deal of business.

Mr. Guthrie: It may be a salutary and successful rule, but the thoughts—you cannot escape from the conclusion, in the very statement of it, that he is bound by it, you cannot escape from the conclusion that it limits

and restricts his jurisdiction, just as here you are asked to hold that he had no jurisdiction to hold a court of equity, he had no jurisdiction notwithstanding the plain language of the statute, to hold a District Court; that he had no jurisdiction to exercise the rights and duties and powers conferred upon him by the statute because he had not seen fit, as intimated by someone here this morning, to go to the Senior District Judge and ask his permission to exercise judicial power.

I beg your Honor not to commit yourself offhand upon a proposition of such vital importance to the integrity of our judicial system. It may be unwise, and 274
a great many think it was unwise, to allow this dual capacity—the dual capacity of a Judge sitting one day or part of a day in the Circuit Court of Appeals and the other part of the day or the next day, sitting in the District Court; and many of us think it of doubtful validity, of doubtful wisdom. Others think it essential for the welfare of the Federal judicial system that we should have, if necessary and important cases call for it, the interposition of a trained Senior Circuit Judge. And your Honor will well remember in your practice that it was always the desire of counsel, if practicable, to have a receivership, particularly of a road running through two 274
or more great districts, as here in two districts, or two or more States, to have a Circuit Judge supervise the administration of the receivership.

I have been at the Bar for fifty-two years, and I have had, if I may say so, innumerable cases of railroad receiverships. For years it was my principal practice. And whenever a great system like this Metropolitan system, with its six hundred millions of property interest became involved, it was always the desire of lawyers, and it is perhaps still today—I am out of active practice, but it was always our desire if possible—to get a Senior Circuit Judge to appoint the receiver and thus exercise adequate and due control over the receivership.

746 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

The Court: Of course, during a large part of that time that you refer to, Mr. Guthrie, the Circuit Court was the only one and the Circuit Judges were the only ones who had the equity jurisdiction.

Mr. Guthrie: That is quite true; but since the creation of the Circuit Court of Appeals——

The Court: January 1st, 1912.

Mr. Guthrie: Well, it is a generation. And at that time the question came up, shall we preserve the power of these Circuit Judges; shall we create this duality; shall we allow a Judge to sit in an appellate capacity one
747 day, to step down and take charge of important matters in the court below the next day. And the Bar was divided, as you may remember.

The Court: Yes.

Mr. Guthrie: I distinctly remember it. And you may remember how Mr. Choate and others urged that it was a wise thing to do, that we wanted to preserve the experience and supervisory power of Circuit Judges in important litigation. It may be that as it has turned out, particularly now as we are increasing the number of District Judges in various districts, it may be that it would be wise not to subject them to this—I think somebody used the word this morning—disturbance of their busi-
748 ness; it may be that it would we wise to say that the Circuit Judges shall hereafter only exercise appellate jurisdiction, as it has become advisable in the handling of our judicial systems for the Judges of the Supreme Court to exercise as little as possible in the original jurisdiction.

But as long as the statute prescribes the rule, your Honors, while adopting a rule entirely valid and binding as between yourselves, cannot adopt a rule which shall deprive, practically deprive, the Senior Circuit Judge, or any Circuit Judge when duly designated, of the power expressly conferred upon him by statute.

We are not here to criticize these rules, but I must say that in any event they may require revision. You say that applications for a receiver shall only be made to the Judge sitting in the motion part. Suppose that Judge is not available or, to use the phrase of the day, not get-at-able, and it is important to have immediate relief; supposing the Senior Circuit Judge is not readily get-at-able; are our duly designated Circuit Judges sitting here to have their hands tied and unable to work because, vis-a-vis, they can not get the permission of the Senior District Judge to perform their judicial duties and exercise their judicial powers?

Your Honor referred to the case of Galveston Company.

The Court: Yes.

Mr. Guthrie: Where Circuit Judge Learned Hand wrote the opinion, and where Circuit Judge Manton and Judge Chase sat.

The Court: Yes.

Mr. Guthrie: You will remember that in that case Judge Learned Hand spoke of the limited power—the limited power—of the District Court under section 731 to make rules for its own procedure, "but somewhat more limited still," he said, "and earlier in origin, the power given to the Supreme Court in equity and admiralty." Then he proceeded—shall I read?

The Court: I have read it during the lunch hour.

Mr. Guthrie: Let me conclude my argument, perhaps, with this quotation:

"It is the result of the exercise of a power to legislate delegated by Congress,"—This is the rule-making power—"though circumscribed by the statute which gives it, and by anything contained in the general laws, or the Supreme Court rules, as the statute itself declares."

It is only within these limits that the District Court can make rules.

2752 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

We therefore submit——

The Court: Well, he says further, "Within these limits the District Court may disregard existing practice as freely as Congress itself; its action has the force of law and we are as much bound to observe it as a statute."

Mr. Guthrie: Yes, within those limits. Our contention is that you have exceeded those limits.

The Court: Yes, exactly. The whole question is whether these rules, 1-a and 11-a—with my own theory as I have heard the argument today is, as to the second order, that you cannot escape from them—I think that
2753 the only question really is, if these are a valid exercise of the District Court's rule making jurisdiction. And if they are valid, why wasn't Judge Patterson the only person who might be approached on the subject of equity receivership?

Mr. Guthrie: Why, if they are valid, of course he ought to have been applied to. If they are valid, Judge Manton should not have presumed to do a thing without permission of Judge Knox. Now that, we submit, was never intended by Congress.

The Court: That is the crux of the thing. If these things are valid, then Judge Manton was not acting
2754 within his powers in appointing the receivers, isn't that right?

Mr. Guthrie: Why, he was acting in disregard of what you would call a badly adopted rule of the court, which we say was not validly adopted, binding neither in equity nor as a general rule.

The Court: Have you anything which you want to say about tihs question of *locus standi* of the plaintiff, Mr. Guthrie? That is rather interesting, I think, from what was said about it. It has struck me, as I have listened to it this morning, and thought about the case during the day, that if the defendants both have a stockholder interest in the defendant, assuming, of course,

that their bills are proper in form under the equity rule—I have not looked at them, of course, but if they have a *locus standi* to challenge the appointment of receivers in this other case, because the defendant was a company in which they had an interest—in other words, their *locus standi* would come from being security holders in the same company in which the receivers were appointed, and that they would not have to go into the Brake Shoe case and subordinate themselves to that case by an intervention, that is the thing that interests me very much.

Mr. Guthrie: Would your Honor permit me to answer that in a two-fold aspect? 27

The Court: Oh, yes, indeed.

Mr. Guthrie: This bill of complainant Johnson is demurrable. No stockholder of the Manhattan Company can file a bill for the appointment of a receiver of the Manhattan Company in a case where the Manhattan Company does not appear or has not appeared and does not consent. Certainly a stockholder of the Manhattan Company, which is a lessor, can not file a bill to have a receiver appointed of the Interborough, which is the lessee.

The Court: Yes, but Mr. Boehm represents an intervening interest against the Interborough, you see.

Mr. Guthrie: Well, what of it? You—— 275

The Court: Well, I don't know.

Mr. Guthrie: He is not a judgment creditor. You haven't any consent here before you. How can you entertain this bill to appoint receivers for these two corporations on any such allegations as you find here? Is there a single case in the books where the receivers have been appointed by a court of equity under such circumstances?

The Court: I don't know. The circumstances always change. What I want to get at, it might be that it would be premature to appoint other receivers, but you might

2758 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

possibly feel that that order of Judge Manton's was not valid, and that therefore the present receivers should be set aside and the present receivers would be removed, their appointments would fall and then you would have to arrange some sort of supersedeas and let the matter be tested on appeal. That would be a perfectly feasible way to do it, if they have a *locus standi.*

Mr. Guthrie: Is there any practice known in equity of a man who claims that he is interested in the subject matter of another suit, filing a bill against the parties in that other suit and asking the court to set aside some
2759 order made in that other suit? There is no such practice known to equity and no authority can be cited sustaining it.

What they should have done in the orderly procedure was to have appeared, and I believe they did appear before Judge Manton, although in a suit which they themselves started, a separate suit which they themselves filed, known as the Barber suit, in fact appeared in the Brake Shoe case. For twenty-seven days notice was being published in the press inviting all parties in interest to show cause why receivers should not be appointed for these two corporations. Nothing has been done fur-
2760 tively; nothing has been done behind doors in this matter.

The Court: I know. Nobody is talking about that.

Mr. Guthrie: It has all been open, with the fullest notice to everybody, these very attorneys present in court, and after twenty-seven days of notice they deliberately refrained from presenting their objections to Judge Manton to the appointment of these receivers and the appointment of the solicitors. They admit that Judge Manton, in appointing these receivers, was granting a relief which they themselves want, and they admit it to your Honor now today; they concede that the Interborough is insolvent; they concede that the Manhattan is insolvent; they ask for receivers, and their only griev-

ance is that they would like receivers of their own choice, and some other solicitors appointed. Surely that is a matter that should have been presented on proper statements of fact, proper objections, to Judge Manton, when this order to show cause was published for twenty-seven days. Judge Manton could have passed upon the merits of their objections to these two receivers and to the proposed solicitors for the receivers and, had those objections been overruled, they could have had their remedy by appeal. Certainly this roundabout procedure of going to another Judge and asking him to set aside the action of a Judge of the same court ought not to be sanctioned or tolerated excepting in the clearest case of want of jurisdiction, and then certainly not on the application of stockholders of the Manhattan Company or even stockholders or bondholders of the Interborough Company. They have no right to ask for a receiver without the consent of the companies. 27

The Court: Well, they have a right to ask for a receiver. They may not get it without the consent of the company.

Mr. Guthrie: Oh?

The Court: Well now, it is not, perhaps, quite so easy. If it came to the question of an appointment of a receiver, why couldn't they use the answers that have been filed in the Brake Shoe case in order to establish the basis for being the ground for receivership, the admissions in that case to be used on a motion for receivership in the cases that they have here? I do not see why that should not be. 276

Mr. Guthrie: Those answers were put in for the purposes of that suit.

The Court: Yes, but that is always the case.

Mr. Guthrie: And not in any other suit, for the purpose of authorizing the Court to appoint receivers against the consent of the defendant corporation. There is no such practice.

2764 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

The Court: I know, but it is a well known thing that you can put in pleadings as admissions, and I should think that that would be an inescapable difficulty. And the thing that really, to be quite frank, causes me the most difficulty about the thing is that *locus standi* question. I don't believe that—I can't think that they would have a *locus standi* if their papers are sound, if they are proper documents. I do not see how they could, really. Mind you, I don't pretend to know it all or anything like that, but I don't see how they can get an agreement in that case and raise the point that they are raising here.
2765 In other words, for every alleged wrong there must be some sort of remedy. Now, wouldn't that come under the equity rules and require the intervenors to subordinate themselves to the Brake Shoe case? And then, after ratifying the situation there, how could they attempt to upset it for such reasons as they are giving here? I don't see how they could do it.

Mr. Guthrie: Couldn't they challenge the jurisdiction in their intervention petition?

The Court: No, I do not think so, because you——

Mr. Guthrie: It is not the jurisdiction of the Court, if your Honor please——

2766 The Court: They could challenge——

Mr. Guthrie: It is the jurisdiction of the Judge.

The Court: They could challenge the jurisdiction of the Court, but the only difficulty here is——

Mr. Guthrie: There is no challenge of the jurisdiction of the Court there.

The Court: No, and I say it is not a question of the jurisdiction of the Court. It is a very unique, a serious question. It is not by any means an easy matter to characterize and put it in a particular category. I thought as the argument developed this morning that it would fairly be described as a claim of abuse of power in doing so and that the Judge did not have, so to speak, judicial

jurisdiction, if that means anything. But, as I confess, it is a difficult question.

Mr. Guthrie: If Judge Manton, according to their view, was violating the law, this rule, though we contend it is binding as a statutory rule——

The Court: You mean just lacked jurisdiction?

Mr. Guthrie: Just lacked jurisdiction; they could have sought relief in the Circuit Court of Appeals, a prohibition or mandamus could have issued. Isn't that the orderly procedure?

The Court: I don't know. I never heard of but one case where a prohibition issued under our statute, except 27
in admiralty cases. There was one case, or perhaps two.

Mr. Guthrie: The language of the statute is quite broad.

The Court: I beg pardon?

Mr. Guthrie: The language of the statute conferring jurisdiction of prohibition is quite broad.

The Court: I know it is, but if you will look at the cases——

Mr. Guthrie: And this would be a singularly proper case.

The Court: I had so many of those cases, I had to look them up, and I never saw but one that was not con- 276
fined to admiralty; I thought the statute was confined to admiralty.

Mr. Guthrie: May I call your Honor's attention to the fact that in the order published, the order to show cause why permanent receivers should not be appointed, which was published in the press, Judge Manton specifically provided that "any other creditor of the defendant or other party in interest may be heard."

The Court: I don't see that. What page is it?

Mr. Guthrie: Page 32 of this record. And the same thing in the Manhattan order. And that is the practice that for years I used to follow in these cases all over the

country. And if parties in interest objected to the receivership, why, they would come in on the return day of the order to show cause and challenge jurisdiction. What prejudice is there in subjecting themselves to the jurisdiction of the court in a case where the court has jurisdiction? There is no doubt whatever that there was a diversity of citizenship here in the Brake Shoe case. There is no doubt that the District Court had jurisdiction. There is no doubt that there was proper proof, that a proper bill had been filed. The only question is that the Judge did some, we will say, arbitrary act, or
771 some act without authority or some act in contravention of a rule of the court.

It seems to me that the orderly practice would be—certainly that is what we would have advised a client to do—to challenge before the court, challenge his power to appoint a Receiver, and say to him, "You cannot do it because these rules of the District Court are valid," and if that objection is overruled, to appeal. That is the orderly way to handle the business of this court. You have got a supervisory body there in the Circuit Court. And then I think if that Circuit Court did not given then satisfactory redress, they could go to the Supreme Court
772 of the United States. At any rate let us have this question, if it is to be passed upon by the Circuit Court of Appeals and the Supreme Court of the United States, passed upon in some regular, known, orderly practice in equity and not such an anomalous proceeding as we are having here, of which your Honor can find no precedent. No precedent can be cited to you, and you have simply the speculation that, should not a man who claims that he has an interest in some other person's suit go to some judge and ask him to set aside that suit.

The Court: It is not an interest in some other person's suit. It is an interest in a defendant and the Receiver appointed; it is his own interest. I do not think

there is very much in that, if you pardon me saying so. I may be quite wrong about it, but it does seem to me that when he is a security holder in either or both of these companies represented here, why, he would have his right to say, "We do not like to have that Receiver because we do not think he was legally appointed." That I don't know.

Mr. Guthrie: Well, they have a right to claim anything, but are you going to reach out, exercising the responsibility of the jurisdiction of this court, and establish such a precedent?

The Court: The most difficult question in the case, it 27
seems to me, is that locus standi question. I do not think that the other thing presents so much difficulty. But that is a little bit difficult. You don't treat it in the briefs at all?

Mr. Franklin: Yes, it is in our briefs. In our supplemental brief at page 7 we refer to the case of *United States* v. *California Canneries*, 279 United States; also to Rule 37 of the Equity Rules, and also to the case of 58 Federal (2nd) 721, the Circuit Court of Appeals for the 8th Circuit.

The Court: What do they say? But wait until Mr. Guthrie is finished.

27

Mr. Franklin: Certainly.

Mr. Guthrie: May I add one word, if your Honor please?

The Court: Yes.

Mr. Guthrie: It cannot be improper to say a word about the vital importance of an early settlement of this question, this conflict of jurisdiction.

The Court: Oh, surely.

Mr. Guthrie: It was suggested that it made no difference whether, in matters of jurisdiction and practice, $500 or $500,000,000 were involved.

2776 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

The Court: No, no, that wasn't it. It did not make any more difference to me whether a case of that much was involved or the other.

Mr. Guthrie: But it does make a difference in the public interest. We have here a situation in which everybody before you admits that a Receivership is imminently necessary and was when these Receivers were appointed.

The Court: That is common ground, I will concede.

Mr. Guthrie: The two men who have been appointed are men of the highest reputation in this community.

The Court: Oh, dear me! I know one of them very
2777 well myself. We are not dealing with that question, are we, or anything except this jurisdictional question?

Mr. Guthrie: You are dealing with it under this bill, which attacks the propriety of appointing these men; a personal attack is made upon them as it is upon the attorneys.

The Court: Yes, but I was not talking about that.

Mr. Guthrie: I know that you are not.

The Court: I was dealing with this purely as a jurisdictional question.

Mr. Guthrie: I am dealing with the whole situation.

The Court: Well, all right, sir.

2778 Mr. Guthrie: I think it my duty to urge your Honor to contemplate the mess which must result by establishing the precedent which you are now urged by our adversaries to make, when there is a perfectly simple and adequate remedy in the court that appointed these Receivers where, within a very few days, for we shall facilitate them in every way, a review of their alleged grievances by the Circuit Court of Appeals can be obtained.

We must earnestly urge that irreparable injury must result to these vast property interests in which the public is so vitally concerned from establishing any such precedent as would be established in the case if you should enter an order vacating the appointments made

by Judge Manton, and leaving this great railway system in the air.

The Court: Surely, Mr. Guthrie, you must realize that I would not do anything quite so foolish as that, no matter what decision I arrived at. Of course I would not. If I decide that Judge Manton did not have jurisdiction, and if I so hold, why, then I would suspend the operation of my order doing so for a period of ten days or something like that to enable the parties to take an appeal, and therefore there would not be any break in the continuity of the management of the concern. Not at all. I would not dream of doing that. And I also, if I should come to that conclusion, I certainly will give time enough for them to appeal, and suspend the operation of the order. You can do that. That is a supersedeas pro tanto. And then the Circuit Court of Appeals can do the rest and hold it up while they are deciding the question. So don't be worried about the railroad. I won't do anything so foolish as that.

Mr. Guthrie: Your Honor, of course, will appreciate the duty of counsel to mention the consequences of an adverse ruling.

The Court: Oh, yes. The court has to contend its common sense as well.

Mr. Stryker: May I say a word on behalf of the Protective Committee of the holders of the ten year 6% Gold Notes of Interborough Rapid Transit Company in opposition to this motion?

There are some $10,500,000 of these notes outstanding which become due on the first day of October of this year, and the interest accrued on those notes brings the total sum to $10,815,000.

After the argument of the leader of the American Bar discussing these points, I think it would be, indeed, supererogation for me to attempt to rehash them in any way. There are one or two aspects of the case, however, which, if your Honor is not now too tired——

2782 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

The Court: Go on; I will hear you a moment.

Mr. Stryker: You will bear with me a moment?

The Court: Absolutely.

Mr. Stryker: I would like to amplify by a word or two the brilliant and conservative arguments of Mr. Guthrie and Mr. Tuttle in regard to a collateral attack. Would your Honor turn for a moment to page 4 of my brief, if you happen to have it before you?

The Court: Yes, I was just looking at it now. Yes.

Mr. Stryker: Of ex parte Richards, where District Court Judge Keller said, "Holding as I do that these
2783 persons are not parties to the bill I must further hold that the question of jurisdiction to entertain the original bill cannot be raised by persons not parties to the suit upon a collateral proceeding."

Also a word—I don't know whether I have this on my brief or not—Luhrig Collieries Company *v.* Interstate Coal & Dock Company, 287 Fed.

The Court: Where is that on your brief, on the same page?

Mr. Stryker: I don't know whether I have it. I dug out these afterwards. It is Luhrig Collieries *v.* Interstate.

Mr. Tuttle: Page 30 of our brief.

2784 Mr. Stryker: In that case it was contended by them that the orders complained of on appeal were made by a circuit judge for whom, at the time the orders were made, no designation under Section 18 was on file in the District Court. So that the question has many interesting analogies to the situation presented here. In dismissing the bill the Circuit Court of Appeals said:

"All the orders made without designation by the Circuit Judge above referred to were prior to any right on the part of appellant to be heard in this cause. Therefore it has no right to complain about orders made before its rights accrued, but in any event the orders were made

by a de facto judge and cannot be assailed collaterally."

Now, there are a few things here at least platitudinous, and perhaps idle as it may be to say that they are not in controversy——

The Court: (Interposing): Unfortunately the law is full of platitudes.

Mr. Stryker: Pardon me if I mention a platitude or two in the course of my argument. Perhaps you will be patient with me. One of the things that is not disputed in this case is that Judge Manton is a judge of the Circuit Court of Appeals of the United States. Another fact that is not disputed is that under the provisions of the 27
Federal Statute he has the right to designate himself to hold a term of the United States District Court. And if I have understood the argument thus far, it is that those two facts are not disputed, and the only question is as to whether, in having so designated himself, he violated some rule adopted by the judges of this court which was binding upon him.

Now may I direct your Honor's attention to page 5 of my brief to just a bit of language from the United States Supreme Court, written by Mr. Justice Matthews. This case was to the effect that a party who desired to set aside an order must adopt the proper remedy of ap- 27t
peal, and now let me read what the Supreme Court of the United States held, as this may be vital to the whole situation:

"The rule is founded on deeper grounds of public policy in defense of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law, and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them. The rule therefore has respect to the court and to its judgments, and not to the parties, and no misconduct or demerit on their

788 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

part except fraud in procuring the judgment itself can be permitted to detract from its force. It is equally true and well settled in the foundations of the law that neither misconduct nor demerit can be imputed to the court itself."

Now, if I have understood the argument in this court today, the courage as not been shown to make a direct attack, but obliquely, indirectly, inferentially, the position of our adversaries, if I have understood it, at least might be susceptible of that interpretation, and I wish to say that the Supreme Court has said that neither mis-
789 conduct nor demerit can be imputed to the court itself, it is an invincible presumption of law that a judicial tribunal acting within its jurisdiction has acted impartially and honestly; the records of its proceedings embrace verity, its judgments cannot be impugned except by direct process from superior authority; the integrity and value of the judicial system as an institution for the adminstration of public and private justice rests largely upon this wholesome principle.

Now, let us see this situation, if your Honor please. If I understood it correctly, there is something upwards of a half a billion of dollars involved here. These pro-
790 ceedings were had before a United States District Court judge; those proceedings have been acquiesced in by outstanding members of this community and their counsel, and you will find, if you will read the record of what has transpired before you, where petitions, for instance, of the first mortgage bondholders of which, as I recollect it, there are outstanding somewheres upwards of $182,-000,000, represented by the Davis, Polk firm, and the committee headed by Mr. J. P. Morgan, petitioned to intervene in this case before Mr. Justice Manton, and in that petition it was stated, I think at Paragraph 2 that these Receivers, naming them, were duly appointed by Judge Manton. And the same language is found in the

petitions of other committees representing enormous, almost fabulous sums of money in this case, all taking the position that the orders granted by Mr. Justice Manton were good orders and that the Receivers were good Receivers and duly appointed.

Now, of course, the views of counsel, the views of outstanding members of the community, naturally your Honor will not follow, but I think you will not ignore them at least as significant as the opinions of able and responsible people.

Now, you are asked in this case, if the Court please, not to set aside the Receivership and not to say that 279
these rules did not require the aegis of this court and the intervention of that Federal jurisdiction, oh no, not that, but you are asked to interfere with the orders of Judge Manton which have been approved by enormous financial interests in this case, at the instance of a man who says he is the owner of 100 shares of the stock of the Manhattan Company, and you are asked to do that not in the Brake Shoe case but in a collateral proceeding.

A great deal of discussion has been had here, if the Court please, in regard, if I have understood it rightly, to proprieties or something of that kind.

The Court: I don't want to hear about it.

Mr. Stryker: I have a point to make there, your 279
Honor. What I want to say is this. Now, with the orders of Judge Manton thus approved, I would like to call your Honor's attention, if you will just bear with me a moment, to amplify, if I can, what Mr. Guthrie has said, and I will make it very short, in regard to one judge of a court of coordinate jurisdiction intervening, I mean—well, taking jurisdiction of business upon orders of another judge. Now, platitudinous as that principle is, there is a sentence or two here from the highest courts which I would like to press on your Honor.

2794 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

I will have to leave these cases. Some of them I found after my brief was written.

(Informal recess.)

Now, if your Honor please, in Reynolds v. Silver Mining Co., 32 Fed. 354, Justice Brewer of the United States Supreme Court said, in the Circuit Court of Colorado way back in 1888, when he was asked to dissolve an injunction which had been granted by another judge of that court, I think that is on Mr. Tuttle's brief somewhere.

The Court: Yes, Mr. Tuttle's brief. I thought I was
2795 reading that.

Mr. Stryker: I don't know just what page it is.

The Court: Never mind. Go on, tell me about it.

Mr. Stryker: At any rate, he declined to do this and he said, there is just a line or two.

"I think that an orderly administration of justice requires, and justice itself, that in the long run and the general average be best secured if litigation commenced, before one judge continues before him until it shall be taken before an appellate tribunal."

Now another case, United States v. Rizenelli, 182 Fed. 675, at 678 the Court said,

"The general rule which forbids judges sitting in
2796 the same court from overruling for like reasons the decisions of each other does not have its origin merely in motives of personal courtesy but, as experience amply proves, rests upon considerations of a wise public policy. Any other course would tend to unseemly struggle in the court and would likely result in a weakening of public confidence in the soundness and finality of judicial decisions."

One more case and I will stop on that point.

The Court: Is that down on the brief?

Mr. Stryker: I don't know. I dug these out at the last moment.

The Court: Give me the citation of the last one.

Mr. Stryker: Yes, sir. That last case was United States *v.* Rizenelli, 182 Fed. 675.

Mr. Guthrie: We cover those on our briefs.

Mr. Stryker: What page of your briefs, Mr. Guthrie?

Mr. Guthrie: Page 22.

Mr. Stryker: Now I have one other case, the case being reported in 10 Federal (2nd) 937, Commercial Union *v.* Anglo South American Bank. That is also on Mr. Guthrie's brief, I am told.

The Court: What was that name?

Mr. Stryker: It is Commercial Union *v.* Anglo South 27
American.

The Court: Yes.

Mr. Stryker: Now, if your Honor please, it occurred in this circuit.

The Court: C. C. A. case?

Mr. Stryker: Yes, a C. C. A. case, 1925. In that case Circuit Judge Mack, holding a district court, denied the motion to dismiss the complaint because of insufficiency. At the trial the defendant moved to dismiss on substantially the same ground, that it failed to state facts sufficient to constitute a cause of action, and at the trial the motion was granted. On appeal the C. C. A. re- 279
versed, and here is what they said, and I think this language very much in point, to me:

"We are not aware that it has ever before happened that in the Southern District Court of New York or any District other than this Circuit, one Judge has, in effect, undertaken to set aside or ignore an order made by another judge of coordinate jurisdiction in the same suit."

Now, if your Honor please, the least that can be said about this main issue that is before you, the very least, I think, is that certainly there is a very honest difference of opinion with regard to the validity of these orders. Certainly the opinion of a man of the standing of Mr.

Guthrie, of his known character and standing at the bar cannot be just lightly cast aside. Your Honor will, of course, weigh it like any other opinion, but my point is this, that inasmuch as there is at the very least, at the very irreducible minimum, a fair difference of opinion as to the legality of what Judge Manton did, that I respectfully present to the court as an officer and as a friend of this court, not only in the interests of justice, in the interests of the court itself, not assuming jurisdiction here to set aside the order of another judge sitting in this building, sitting at the time as a District Court Judge.

Let me say this, that I have talked with counsel and, to the best of my ability, have tried to examine the law, but I have found no case in the Federal Courts where any such thing was ever done, and apparently the Circuit Court of Appeals down to 1925 was in a similar position.

Your Honor has said with that characteristic fairness which the people and Bar have so long known, that if you did decide to do this thing you would not disrupt it but would give everyone ample time to appeal. But there is a consideration beyond that, fair as that is, of course, that I should like to urge upon this court, and that is that the judgments and opinions of this court and of the particular member whom I have the honor to address carry weight and dignity in the community. Now, regardless of the ultimate outcome of this litigation in a different court, if I may say so, the order or the opinion somewhere in the litigation that Judge Woolsey thought something was the matter with this receivership will cast a kind of stain and reproach on it that no appeal will remove, and here are all these interests. Now, you know I mean that. Here are all these interests involved, and I submit that this Receivership should not be impugned by even that much, even though we, with great respect to the court, think that such decision would be tempered.

Now, if your Honor please, I want to call your Honor's attention to one other consideration. Before I do that, just one word. I do not think anyone has said—even the distinguished counsel, perhaps, has discussed collateral attack. There has been a lot of discussion about it, and about judges acting de facto and acting de jure. Now, as I understand it, a collateral attack cannot be made even in the same action before some other judge. The proper remedy is to take a position in that action either by way of bill, prohibition, mandamus or something else. Some discussion has been had about a de facto judge. Well, I suppose what is meant by that, and the 280
least that could be said is that he was a judge and that all that could be doubted was as to whether the power that he exercised was lawfully exercised.

Really, if it please the court, I cannot conceive of this court assuming jurisdiction here and overruling the decision of its colleague, or rather, of a temporary colleague, even though unwelcome, as he was at the time, where it has never been done before. If we follow that out to its logical conclusion, wouldn't it be this, and I think somewhere in someone's brief a case is before you where the Supreme Court referred to the time in New York State, happily now past, about which all of us read, and which I think few of us remember when people rushed 2805
around from one judge and then they rushed to another judge and then they rushed somewhere else, all in the same jurisdiction, and I think those were in the days of Jim Fisk and the Erie litigation and so forth, and the Supreme Court, or I mean the United States Supreme Court said that is just the thing that was not done in the federal courts.

What is the nature of this litigation, and who are these people here? I have referred to the fact that, or rather it has been mentioned, that they appeared in another court, or before Judge Manton, themselves. I have men-

tioned the fact that the leading members of the bar in this state have stated and have presented for their clients cases stating that these Receivers were duly appointed.

The Court: That really doesn't mean anything.

Mr. Stryker: What is that, sir?

The Court: It doesn't really mean anything except that they accede to it.

Mr. Stryker: That is what I mean, they acquiesced. In this case I think this has an interesting bearing. I am going to stop discussing this case. I really would like your Honor to have all, as I think you said somewhere, all
2807 the facts and all the sidelights on this case, and I think it might help to understand what is the true nature of this case.

Back in September of this year, rather on August 29th, a bill was filed in this court entitled "Harry Barber v. the Manhattan Railway." The cause was E-71-39. Now, you will see the bearing of this in a minute,—It has only been mentioned, wherein the plaintiff Barber asked that a Receiver be appointed for Manhattan. This was four days after the filing of the American Brake Shoe suit. The Receivers in the American Brake Shoe suit were named as parties defendant in the Barber bill. The at-
2808 torney for Barber was a man named Lawrence Berenson who, I understand, is well known in this court. On that day that the Barber petition was filed, the same day Barber, by his attorney Berenson, filed a petition asking leave to join the Interborough Receivers appointed by Judge Manton as parties in the Barber case, and Judge Manton on that day entered an order directing the defendants in the Barber bill to show cause on September 6th why a Receiver under the petition of Barber sworn to by his attorney should not be appointed for Manhattan.

Now then, here, clearly, and I will pin this home in a moment, clearly this presentation of this petition to Judge Manton was the clearest possible recognition by

the solicitor for the complainant in that case of the jurisdiction of Judge Manton to sit in this case, Rule 1-A or 11-A to the contrary notwithstanding.

The Court: That case doesn't make any motion here.

Mr. Stryker: No, and if you will just bear with me a minute, I think you will see my point.

The Court: Yes.

Mr. Stryker: I haven't made it yet. Just let me put this in. On the return of that motion—then I want you to see what the character of the case is and what kind of good faith we know is in it on the part of these complainants. On that very day Charles Franklin, who is 281
the attorney of record, is he not, in this Johnson case?

The Court: Yes.

Mr. Stryker: Charles Franklin, a member of a committee of Manhattan stockholders known as the Amster Committee, who stated that he was a counsel for some Manhattan stockholders and others, he appeared, and also there appeared representing other stockholders of the Manhattan, Louis Boehm, and this gentleman, Louis Boehm, sits here, and he is of counsel in this bill in the Johnson case, in which they say that Judge Manton broke the law, that he did something illegal. Now, these two gentlemen, at the time when they hoped to get relief 2811
before Judge Manton, came there representing clients in the Barber case, each admitted the jurisdiction of Judge Manton, and in the second paragraph recited, in consonance with his other petitions, that the Receiver for the Interborough had been duly appointed.

Now let's see what that man did, and you will get the real aspect of this litigation and what it is that your Honor is asked to do here. Now then, at the hearing both Franklin and Boehm stated to Judge Manton that it was the condition of Manhattan that caused their bill to be filed.

You asked me where I get these facts. Your Honor

2812 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

will find them in the affidavit of Nicolls, I think it is, there.

Mr. Boehm: The affidavit does not so state.

Mr. Stryker: It is in the affidavit that you filed. I beg pardon, it is Franklin and not Boehm.

Mr. Franklin: Mr. Franklin.

Mr. Stryker: Mr. Franklin, yes, pardon me. Now then, let's see; Judge Manton announced that he had already appointed William Roberts, president of Manhattan, as temporary receiver thereof. Thereupon Mr. Franklin, the solicitor in this case, who says Judge Man-
2813 ton acted illegally, appearing before Judge Manton in this matter, thereupon Mr. Franklin urged Judge Manton to appoint Nathan Amster as additional receiver for the Manhattan. Mr. Boehm asked Judge Manton to appoint an additional receiver, Malcolm Sumner. Now you are beginning to see what this case is when the camouflage is torn off, what this case really is. Among other things, Mr. Franklin on that occasion said "We strongly urge that your Honor will consider to make this Receivership —this Receivership—entirely above criticism. That I think would be much more pleasing to all the stockholders, to have someone acting with Mr. Roberts, if only
2814 for the sake of having two Receivers instead of one."

The Court: Was Mr. Roberts the president of the company?

Mr. Stryker: Yes, sir. He had been appointed as Receiver of the Manhattan.

(Continuing reading) "What we are interested in and I want to join in and I would like to present one myself, is to have someone completely independent of the Interborough;" Mr. Boehm stated "I would like to suggest the name of Malcolm Sumner."

Now we see what this issue is about involving jurisdiction. The application for the appointment of an additional Receiver in the Barber suit was filed then with Judge Manton.

Mr. Boehm: Would you read what else I said then?

Mr. Stryker: You can read it; it is there. Whatever is there is before the court. (Reading) Subsequently by stipulation of Berenson as attorney for Barber, the time was extended to October 16th to answer.

What happened? These men who do not deny the necessity for a Receivership, who fully concurred in every way, and who said to Judge Manton, who they now tell you was acting illegally, that all they wanted to do to make this Receivership perfect was just a little thing of appointing Malcolm Sumner and Mr. Amster Receivers, then the Receivership would have been fine, then the jurisdiction would have been all right, then Judge Manton would not have exceeded orders 1-A and 11-A, then they would not be in here claiming a usurpation of power and an illegal act by the Senior Circuit Judge, if they just got their Receivers appointed. So what is paraded as an issue of jurisdiction, presented to you as an interesting constitutional question of the courts, comes down to the sordid question, though heretofore suppressed by them, that they went before Judge Manton, recognizing his jurisdiction, were defeated and on that day, or rather on the 16th of September, went to Judge Caffey and got this ex parte order to show cause.

The Court: That is the way you always get orders.

Mr. Stryker: Wait a minute, your Honor, if you will pardon me and just let me say this. Of course we do, but when I get an order to show cause, I am frank enough to tell what I have done before in the matter, if it is material, and I defy counsel for the complainant to cite anywhere in their papers the facts of the position which they have taken. They do refer to the Barber case. Now, just let me finish. Now, if your Honor, what is really underlying? You have all the legal points, masters of the law have presented them to you. What is it in effect bearing down under this record, under this smooth attack on Judge Manton, under this implied and rather oblique

criticism of one of the finest lawyers and judges that ever lived in this town, Victor Dowling, and suggesting that independent and proper Receivers be appointed? What is the motive of these men? It is the low motive that they want to get someone else appointed, that is all, that is their interest in the jurisdiction of the court.

Just let me say this, and I am through. Now, I don't know just how to say this, but your Honor will understand my attempt to say this as delicately as I can. These gentlemen are clever lawyers, shrewd and wide awake. Having been defeated before Judge Manton, then they
819 decided that they would try something else, and the Amster Committee through Mr. Franklin intervened in this other proceeding, the Amster Committee which represented before Judge Manton that everything would be lovely if only he could get Mr. Sumner and Mr. Amster appointed, in effect it would be fine, and they there recognized the jurisdiction.

The Court: I really don't appreciate these low things at all, Mr. Stryker. It has got nothing to do with it.

Mr. Stryker: I don't want to go on with anything your Honor does not want to hear, but I would like to
820 point out, as an officer of this court, it has not been done, and your Honor, of course, can weigh what you want to, but I would like just, if I might say so, if I were just a friend of the court, and have you understand at least what I think, but if you think I am wrong, that is another thing, but what I think I will ask you to do as bearing on the question, you have got the legal question and all that, but as bearing on the question of whether you will admit what I say is not quite unusual but unprecedented throughout.

I say that it is quite plain that these gentlemen, hearing or feeling or surmising that there possibly might be or thinking that there might be some fever between this

court—I don't mean this judge, I mean this court and Judge Manton, that here would be an excellent opportunity, a very shrewd move to come in here and try to play that up and, as it were, drive a wedge between the two courts and, for their own interests, capitalize it. I say that, in my judgment, is what they are trying to do.

The Court: This court is old enough not to take anything of the sort.

Mr. Stryker: I know you are old enough and wise enough. The only reason I say that is I just want to present it as my theory of this trap that they are trying to lay for you. 282

The Court: What difference does it make on the jurisdictional question what their motives are? I don't see myself.

Mr. Stryker: I will tell you, your Honor. I will try to answer that question. I will answer that question. It makes this difference, that in a question which, certainly, the least that can be said is that it is open to debate, that with a motive of that kind, a desire of that kind, where your Honor might do one thing or the other, I simply mention that your Honor might well consider the real purpose of this case in determining how to decide this case and what particular discretion you will exercise.

As to the jurisdiction, as to the legality of these orders 2823
and as to all these fundamental questions, of course, it hasn't anything to do. I simply present it and I accepted your Honor's statement about wanting every facet, and that at least seems to me to be a facet in the case.

The Court: I did not mean that sort of a facet.

Mr. Hobbs: Before Mr. Stryker sits down, I happen to be one of the unfortunate owners of some of these 6 per cent bonds. Will that gentleman tell me, or tell the Court what the difference is in principle between the action of this gentleman, and his self-appointed com-

mittee, in forming a protective committee and asking us to deposit with them; to protect them from the Court or the Receiver or what? I merely would like to have an answer. I do not think that charges like he has made should be made unless it comes——

The Court: They make no particular impression upon me, because I am not thinking about parties or about counsel, but the case itself; nothing but the case itself, and it is a question of jurisdiction and a question of administration of justice between different Judges and all those things have to be gone into. That is the main
2825 point. Do you want to be heard?

Mr. Sunderland: If your Honor please, I will be very brief. I am a party in the main Interborough suit. As I stated to your Honor the other day, I represent the Interborough 7 per cent. Noteholders' Committee and 5 per cent Bondholders' Committee. The 7 per cent notes came due on September 1st. There are therefore due and unpaid something over $32,000,000 of those notes, and the amount of the bonds is very large.

Now the committees that I represent appear specially for the purpose of calling to your Honor's attention one or two facts that we think are of vital importance. These
2826 notes and bonds, representing in the aggregate by a long way the principal debts on these properties of the Interborough, the holders of which have made tremendous sacrifices in the past—I refer to the readjustment made in 1922,—and we are confronted with a factual situation, and that was the necessity of the protection of a court of equity. That equity court of this circuit took possession, and began to administer this vast property in that proceeding. The integrity of that proceeding on the jurisdictional question has never been attacked until it is attempted to be attacked in this proceeding. Very important rights, property rights of these creditors have been and are being dealt with in that proceeding. Now

the relief asked for in this collateral proceeding is that those orders be vacated, and all I now say to your Honor, and I say it most respectfully, is this: It is a greater question than the rules of this circuit. It is, as you have well said, a jurisdictional question. That question is one that has been dealt with most painstakinginly in behalf of the interests that I represent, and the other interests. Now in attempting to deal with that question necessarily it involves these very substantial property interests. It is our view and it is the view of many of these creditors who have consulted counsel, that this question of jurisdiction was one free from doubt, but whether that is so or not, the fact is that under the statutes this equity court took possession of our property and is administering it, and, to go back to a time, as has been suggested, if this question of jurisdiction results in anything it results in the vacating of these orders, it puts our interests in jeopardy, the superior interests of creditors as against the claims of a stockholder of one of the companies—not of the main company,—and the effect, I submit respectfully to you, of any action in a collateral attack of this kind is very great on the substantial interests of these creditors, and, therefore, your Honor, I respectfully request that this application be dismissed.

Mr. McCollom: If the Court please, I represent the Trustee under the Manhattan Railway Consolidated Mortgage, and inasmuch as Manhattan interests have not been heard from I should like to state, as briefly as I may, a summary of the position which we take on this application. I have not appeared, but I will ask your Honor's permission to have the trustee of the Consolidated Mortgage appear specially for the purpose of setting up the reason why it thinks this bill of complaint should be dismissed.

330 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

The Court: Are you interested in any way whatever in the other case?

Mr. McCollom: We are a party defendant by intervention in the Interborough suit.

The Court: I have held that parties that appeared in the other case can appear in this matter.

Mr. McCollom: I do not want to appear generally in this case.

The Court: You are not appearing in the sense that you are a party to the suit?

Mr. McCollom: Under the Consolidated Mortgage
331 there are outstanding over $40,000,000 of bonds which have been in default as to principal and interest. Under the Johnson bill it is stated that it is necessary for the Court to take the action requested in order to protect the Manhattan interests. We say that it is entirely unnecessary to attempt to protect Manhattan interests by an improper and defective method; that they can be properly and perfectly protected in a proper way. We say also that the main question which has been argued here today, that is, the ultimate question of the power of Judge Manton to act, is not necessarily for a decision in this case. If this Court will first determine, what we
332 believe to be the settled law, that his acts were at least *de facto*, and can be continued in this case——

The Court: As I say, that is the most interesting question to me; the *locus standi* of these gentlemen for a collateral attack.

Mr. McCollom: It is just a little different way of putting it, Judge. If this Court is of the opinion that Judge Manton's acts are *de facto* and cannot be attacked in this way, then the question of what power he had or did not have is not before the Court for decision.

The Court: The first thing to determine is whether the people who are moving parties here can properly be

heard on the subject which is their objective. If they cannot be properly heard on that subject, that is the end of it, and if they can be properly heard on that subject, you have to determine what the end of their objective is.

Mr. McCollom: They are seeking to be heard in reference to the acts of a *de facto* judge, one as to whom there could be no possible dispute. He was acting at least *de facto,* whether *de jure* or not. And it is equally plain that the acts of the receivers, the receivers being the arm of the court, are equally *de facto* acts as are the acts of the *de facto* judge, except that the acts of the judges can be attacked by a direct proceeding. 28

Now we say where the court, acting at least under the color of authority, which was the language used in the McDowell case in the United States Supreme Court, has taken possession of the property of the corporation, whether it be an enormous traction system of this kind, or other property, that the rights of bondholders and other persons interested may require immediate protection. They cannot be required to guess, at their peril whether the court which has taken possession of the property is acting within its powers, provided, of course, that the requisite diversity of citizenship, and other jurisdictional facts appear, as do clearly appear in this case. 283

Now under the same circumstances, if all the Judges of the same court were not to recognize that a judge acting at least *de facto* for that court is beyond attack while he is acting *de facto,* the situation would be worse than in the old railroad case—I think it was the case of the Wabash, where a railroad line ran through several circuits and the different judges in the different circuits appointed different receivers, except in the present case our situation would be even more unfortunate, because in the Wabash case at least a person needing the protection of the court knew what judge to go to but in this

case if the *de facto* acts are not recognized, then no one would know to whom to apply.

To illustrate, your Honor: On Monday of this week Judge Manton directed the entry of an order providing that the Interborough receivers should pay the interest due October 1st on the Manhattan bonds, and the taxes, subject to ascertainment of the receiver's cash position. Now this direction was made upon the united application of the Manhattan receiver, the trustee under the Consolidated Mortgage, and the committee of the bonds secured by that mortgage. As October 1st approached, which was
2837 the date upon which that interest was to become due, the only means of payment was in the possession of the Interborough receivers appointed by Judge Manton. Under Equity Rule 4 of this Court it is provided that the Judge who appoints the receiver shall retain supervision of the cause. Now can anyone be heard for a moment to say that the mortgage trustee must fail in his duty to the bondholders by making no application for the payment of interest and taxes until the authority of Judge Manton to act shall have been finally determined and finally after months of delay find that having applied for and obtained his direction for payment of taxes and in-
2838 terest they cannot rely on that direction.

Therefore the trustee under the Consolidated Mortgage takes no position whatever before this Court upon the question of whether Judge Manton had the full power or did not have the full power to do what he did. On the other hand, it is our duty to assert, and we do assert with all the strength of which we are capable, that there cannot be any question that what he did was at least as a de facto judge, and that his acts are beyond attack in this proceeding. We say that so far as the appointment of the Interborough receivers is concerned in the Interborough suit, that no bill filed by a stockholder of Manhattan could possibly reach the appoint-

ment of Interborough receivers in a different suit. That has been discussed——

The Court: Mr. Boehm is an Interborough security holder according to his affidavit here. Is that right?

Mr. Boehm: Yes, your Honor, holding $95,000 of bonds.

Mr. McCollom: There is no authority whatever, Judge, which would support any such position, nor is there any authority which would support the right of a stockholder, by a stockholder's bill of the Manhattan, to attack the appointment of the Manhattan receiver made in the Interborough case. 284(

Your Honor asked, and I think your question was answered, as to what his remedy was. In the order appointing the temporary receivers of the Interborough and subsequently in the order appointing the temporary receiver of Manhattan, there was a provision that all parties in interest, and all other persons, should show cause on the 22nd of September, why the receivership should not be denied. Now the remedy of these complainants was to appear at that time, appear specially for the purpose of setting out their reasons why the receivership should not be made permanent. They failed to do so, but they had an adequtae remedy. 2841

The Johnson bill before your Honor is not even an adequate bill upon which the receiver could be appointed, even if there were not already a receiver appointed by Judge Manton. It does not comply with equity rule 27, not only in the respect in which Mr. Tuttle spoke, but also in respect of the requirement that it must allege with particularity the efforts made to secure action by the directors or excuse the failure to do so. It shows nothing on those lines when it is analyzed.

Now finally, your Honor, I wish to say only this: I most respectfully suggest that the bill of complaint should be dismissed, and the matter ended in that way,

and whatever disposition this Court may make of the bill, I believe that the decision of this Court should clearly hold that Judge Manton has been acting at least as a de facto judge, leaving for future determination in a proper proceeding the question whether he has been acting de jure, and that you should hold that all action which has been or shall be taken by him or by his receivers, until it shall have been finally and duly determined that he has no power to act, is beyond attack on the ground of lack of power. The reason I make that suggestion is that if your Honor should decide not to
2843 dismiss the bill, but should grant relief under the bill, I think by the same order it should be made perfectly clear that the action which may be taken until there is a final determination of Judge Manton's power or lack of power to act,—it should be made clear that any such action is final action upon which the parties may rely.

The Court: Why, certainly. You mean having a provision that *ad interim* the case, until final disposition, all the orders and payments and so forth as made by the receiver should be confirmed as correct, so that you start out with a regularization or affirmance of everything that had been done by you, or up to the point of having other
2844 receivers, is that what you mean?

Mr. McCollom: Yes.

The Court: Why, of course, something of that sort would have to be done, naturally.

Mr. McCollom: But I most respectfully request, your Honor, that the bill of complaint be dismissed as utterly inadequate, the plaintiffs having no standing to seek the relief they ask.

The Court: Have you any cases on that?

Mr. Tuttle: Mr. Guthrie and I would appreciate it very much if Mr. McCollom would put them in some form.

The Court: I would like it if he has any authorities. He can send it to the other people if he wishes.

Mr. Stryker: Would your Honor permit me to file, as soon as I can prepare it, an additional memorandum on the question that has been mentioned so often as to the *locus standi*?

The Court: That is what I am most interested in.

Mr. Stryker: May I have that privilege?

The Court: I will let you do it up until tomorrow night. I am going to try to work on this over the week-end.

Mr. Stryker: I will try to get it done.

Mr. Tuttle: I would like to have the same privilege, because apparently some material I have sent in for the printed brief which I thought was in, apparently has been left out.

The Court: Do not make it in elaborate form. I will do better than that for you. You can send them to the Bar Association on Saturday morning; to the doorman of the Bar Association.

Mr. Tuttle: What hour?

The Court: Say twelve o'clock Saturday morning. No, I will have to be down here to sign orders. You had better send them to Chambers. Saturday morning at ten-thirty.

Mr. Hobbs: If your Honor please, I have a word to say, representing those who are not represented by committees and those who have all the securities except the 7 per cent. notes. It is the first time we have heard from these gentlemen who have brought on this receivership. They did not utter a word before Judge Manton that I could hear, and I think I was the only one who appeared claiming that the receivership was not only unnecessary but was brought about overnight without any notice to the interested parties, but with the consent of all of the officers of the company, only a few days before the an-

nual meeting of the shareholders and on a complaint, I was about to say, the flimsiness of which, if taken *pro confesso,* as they did take it, in other businesses, you could put three-quarters of the now running big businesses in receivership overnight.

The Court: Well, they have to consent.

Mr. Hobbs: I beg your pardon?

The Court: They would have to consent.

Mr. Hobbs: They did consent.

The Court: But you could not put businesses into receivership unless they consented.

Mr. Hobbs: No, I say but they did consent. That is the point. I mean the concern itself did consent without consulting the shareholders and they make it on this ground. I have yet to hear one word here—they went the roundabout way, as Mr. Guthrie said. These gentlemen have to pick a judge about which there was some doubt as to his jurisdiction, and there was no doubt about Judge Patterson's jurisdiction, and the proper party to bring it before in the regular order of business. And in making the point or comment about the rule, that you cannot cut down the jurisdiction or the authority of the presiding judge of the circuit court, the converse is also true. That was limited to special jurisdiction anyway. Neither can the presiding judge of the Circuit Court curtail, take away from, or cut down the jurisdiction of the eight Judges of the District Court. And, carried to its logical conclusion it is this: that the Judges of the District Court, duly created by law can if the presiding justice is to take it by *pro confesso,* decide in all cases and leave you nothing to do, notwithstanding the rules promulgated for the regulation of business and the conduct of cases, and assuming always that the Court has jurisdiction. Not one word has been said here why they went a roundabout way——

The Court: I know, but I am not inquiring into that.

Mr. Hobbs: I know, but then as to the jurisdiction, certainly the District Court has jurisdiction. And why an ex parte proceeding, which is what this was after it is taken *pro confesso* can go against the rules formulated in such cases and take a judge of their own picking, not in the regular course of the jurisdiction is hard to understand. Therefore, if Judge Manton did exceed his jurisdiction in cutting down the jurisdiction of the District Court, what is our remedy?

I appeared there, not agreeing with any of these gentlemen, but trying to show the Court that a receivership 28
was unnecessary; that no demand had ever been made on any of these holders, either the 6 per cent. or 7 per cent. holders or requests to extend the time. We would all have been glad to. And to come before a court of equity and to spend, as I have all day today listening to them denouncing and throwing suspicion upon the proceedings brought before this Court, that they should have come with some explanation of why they avoided this court. Therefore I think the question as to whether the receivers are competent, or the collateral questions of the court's jurisdiction, and whether it was a proper case in which to take the special proceeding, or to take the special action that has been authorized by the rules 285
of the Court in limited or special cases.

Now they gave some reason. What is it? That the Court may appoint a trust company, the Irving Trust Company. As a matter of fact I know of no rule and the Court does not always appoint the trust company in equity actions.

The Court: There is no such rule. There is not even such a custom.

Mr. Hobbs: Then they make the further point, that unless they do this—I do not know whether they mean to go before Judge Manton, or continue this overnight pro-

2854 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

ceeding, or some security holder may bring suit, but they say, therefore, it was in the interest of unification and continuity of the property to have this receivership, whereas in the next breath they say that they want to get rid of the Manhattan properties and it is not in the interest of unification. I won't say what I think the interest is, because it is a question of jurisdiction now. Therefore it is left all up in the air as to whether we are bound to come before the District Court, or whether in any event we can ignore the rules that Mr. Guthrie said should be ignored.

2855 The Court: He said they were not rules.

Mr. Hobbs: I beg your pardon?

The Court: He did not say the rules should be ignored, but he said they were improperly passed rules and, therefore, ignore them.

Mr. Hobbs: Improperly passed rules? I do not know. I know of a number of State Court cases where, in cases a little different, an order to show cause comes before a Judge ex parte, and the Judge does not know, and cannot know what the merits are, but if, on the other hand the defendant falls over himself and says, "Yes, we will come along and *pro confesso,* consent to the jurisdic-

2856 tion," and nobody objects, why, just as any of us could become judges in some special case, if somebody consents to it, but in no case—now this is a case—I do not know any like it, and in every case cited, I think it can be shown that the jurisdiction of the Court, *ab initio* was never challenged as it is challenged here, and if their inescapable conclusions that they mention are a fact, then your rules can be abrogated and they are useless. The rules I suppose are to be made in compliance with statute and the Constitution. This judge's order—it is the district court or the circuit court,—and if the presiding justice of the circuit court has all the powers that Mr. Guthrie, much to my amazement states today, then we have no remedy. I do not know.

My motion to intervene there especially to show in that case there should be no receivership was overruled, and then this proceeding was brought on and I have come in both cases ready to show that if we had, or they would have consented, the receiver should have acted only temporarily until some plan was agreed on; to show there was no necessity for receivership at all.

Now, then, the jurisdiction is challenged, and I think it is properly challenged, and I defy Mr. Guthrie, leader of the bar as he is shown to have been by the gentlemen associated with him, to show any case where from the beginning a rule of the Federal Court had been avoided 285
and the regular court's jurisdictional course was avoided, and they want them to take advantage of another rule whereby in certain cases the presiding justice of the circuit court could appoint somebody else and particularly when he appoints himself. It means to me a *reductio ad absurdum,* to get back at the other side. Is this a collateral proceeding? Where should that jurisdiction be challenged? Shall we say to the court you have not any right to sit there and have not any right to sit on this case, and make some charge of what I do not know? There are many things the judges do not do quite as we want them, but we never think of impeaching them for it. 2859
What is our remedy?

The Court: I know, but they say, I suppose, that you have to find that out for yourself. They say this is a collateral remedy.

Mr. Hobbs: As I say in a court of equity, if the jurisdiction is challenged, why should it be challenged? They could appeal, I guess, but all of these gentlemen except myself, said, "Yes, the company is insolvent and a receivership is necessary." I say no. It is not insolvent.

The Court: I know. I am not dealing with the question of receivership now.

2860 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Mr. Hobbs: Then to get down to this one point, if your Honor please: Is it not incumbent upon them to show that the district court, for some reason, incompetence or something else, were not the proper parties, or the judge sitting there, to hear this case, and then they go up to a judge of the circuit court. Isn't it incumbent upon them to show that something more than they allege in these flimsy affidavits was necessary for a receivership? I ought to sue the Brake Shoe & Foundry Company for bringing on such an action, except they committed us to it by *pro confesso.* If this is not the proper court to
2861 challenge a thing like that—I tried to get the Bar Association one time—I would like to find out what would be a proper case?

The Court: They do not have to suggest it themselves. These other gentlemen are supposed to argue that *locus standi* question.

Mr. Hobbs: How is that?

The Court: I suppose your side will argue this *locus standi* question; this question of the right to make this collateral attack. It is always the first question to consider.

Mr. Hobbs: I do not want to make an attack. I am
2862 not making an attack. I think the Court was either—I won't say blind,—was misrepresented. For instance——

The Court: I do not want to hear about those things. What I want to hear is pure questions of law. Is there any reason why these people can, or why they cannot, maintain this attack on the jurisdiction of the court in the appointment of those receivers. That is the only question.

Mr. Hobbs: I think this is the proper place to attack jurisdiction.

The Court: All right. What I want to get is some authorities. I want some authorities on the subject.

Mr. Hobbs: Well, I do not know any authority or any case just like this.

The Court: All right. Then in principle.

Mr. Hobbs: Except in the Metropolitan Securities case when Mr. Guthrie knows what Mr. Choate said to him and his clients in that case. I do not think there is any case that exactly fits this situation and, therefore, I think it is time to make some law on it even if we have to have a committee of Congress investigate the whole thing and see what changes should be made in the law.

Mr. Franklin: If the Court please, may I have a few minutes to reply? 28(

The Court: Oh, absolutely.

Mr. Franklin: If the Court please, as I started the argument this morning, I intended to go into a number of matters which I thought were material since they came within the purview of the case. They were in support of allegations set forth in the original bill and in the supplemental bill. Your Honor stated that you were only interested in the jurisdictional points, and I then said that that would considerably shorten my argument, and I said nothing about it.

My friends on the other side, however, have taken the liberty of referring to me and to my name, and to the case, and I ask that before giving just the cases your Honor needs in order to decide this case in our favor, the personal privilege of stating certain facts. First I want to say that I have been admitted to this Bar since 1903, and I have handled over seventeen hundred cases, and I have never had a lawyer,—I do not know what this gentleman's name is or who he is, but that was the most dastardly attack that a man could make on a brother lawyer without knowing him or without knowing the facts; perfectly shameless. 286

Now I want to say this, if the Court please: that for 20 years I have been a stockholder of the Manhattan

Railway Company, and that I have got over $200,000 invested in it myself. It is true it is not worth much today, but the reason for that is very obvious. The I. R. T. itself is nothing but a stepchild of the B. M. T.; and the Manhattan relationship is much further removed than even the I. R. T. It cannot be classed even as a stepchild, and the very purpose of this proceeding, as admitted by Mr. Clark and others was to take this empty shell, this empty shell they have reduced it to, and to wipe out that Manhattan stock.

867 Now that gentleman, whatever his name is, made the statement that these committees and these important banking houses had approved the action of Judge Manton. Well, that may be so, but I want to add that their approval of this whole thing won't support a court, and I am ready to prove it.

And I also want to say, and I think this is important, that three people have come to my office, and one at least a prominent lawyer, and asked me to drop this case. I further want to say, if the Court please, that I am representing here, as I stated in my argument this morning, more than 100,000 shares of Manhattan stock, including the Brookin corporation, and a few individual stock-

868 holders that have deposited their stock in the Amster Committee.

I do not like to mention the name Amster, but so long as it has been mentioned I simply call to your Honor's attention that for more than ten years he was chairman of the executive committee of the Rock Island, in one of the most successful reorganizations that this country has ever known, and that he served during that ten years as chairman of the executive committee without compensation; that he did the same regular court service in the Boston & Maine transaction, and, in addition to that, three years ago he had absolute control of Manhattan Railway Company by proxies. He was told

he could elect the entire board of directors, and he refused to do it, but stated that he only wanted fair play for those who had invested their moneys in this company, and it was he that put Charles Hayden on the board, his friend Charles Hayden and E. N. Brown.

The Court: Now——

Mr. Franklin: I am not going to go into this. Your Honor asked me not to go into personalities. They do not belong in this case.

The Court: I do not think so at all.

Mr. Franklin: I thoroughly agree with you, but when a lawyer gets up and tries to associate me with improper 287
motives and things of that kind, when a lawyer has been practicing in this court for almost thirty years with some of the leaders of the bar, because the men I have been associated with for those thirty years have been leaders of the bar, men who were associates with Mr. Guthrie, and, in fact I should say if Mr. Guthrie was in my place, and arguing for my side, I do not think there would be much opposition. I think his great learning and standing would have convinced this court long ago that our case is meritorious.

Now I want also to call to your Honor's attention, coming down now to civil statements: Your Honor may 287
have noticed,—I did not mean to interrupt,—that while one of counsel from the other side were reading this morning, referring to my bill, I got up and complained because he was not reading from my bill. He was reading from a bill filed by Mr. Boehm; with regard to the failure to comply with rule 27. First I want to call to your Honor's attention that in paragraph 24 B of the original bill,—one is marked original and one supplemental bill. I shall read this rapidly because I will give your Honor the cases under the point.

The Court: Paragraph what?

Mr. Franklin: Paragraph 24 B: (Reading):

2872 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

> "Upon information and belief, as several of the directors of Interborough and also directors of Manhattan, and as heretofore alleged, three of the directors of Interborough constitute three of the four members of the Executive Committee of Manhattan; that the interests of these directors are conflicting, and that it is impossible for such directors, particularly those controlling the Executive Committee of Manhattan to act independently and adequately and fully to protect the rights of Manhattan as against Interborough when
2873 acting in such dual position; that various questions of the rights of Interborough and Manhattan must necessarily arise, particularly as to operating and maintenance costs and revenues in connection with the operation" of the line.

Then in our supplemental brief,—I am very glad I thought of the supplemental brief, if your Honor please, because I think it covers adequately almost every question that the other side mentioned and gives other Federal or Supreme Court authorities and, I think, one case which is a New York Court of Appeals authority.

2874 Now on that rule, in my main brief at page 38,—that is the page which I personally signed, I point out four separate cases:

> *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.*, 215 U. S. 435;
>
> *American Creosote Works Inc. et al.* v. *Powell*, 298 Fed. 417 (C. C. A., 5th Circuit);
>
> *Ogden et al.* v. *Gilt Edge Conc. Mines Co.*, 225 Fed. 723;
>
> *Whittaker* v. *Brietson Mfg. Co.*, 45 Fed. (2nd) 465 (C. C. A., 8th Circuit).

Each of those cases, your Honor will find were where stockholders find that it would be futile to ask the consent of directors to the bringing of an action in this court that they will permit the action to be brought without compliance with that rule. Now a good deal has been said about collateral attack. In that connection I want to read a few lines from the decision of the United States Sppreme Court in the case of *Windsor* vs. *McVeigh*.

The Court: Is that in the brief too?

Mr. Franklin: Yes, that is in the supplemental brief on page 2, where the United States Supreme Court said— first I want to point out that our contention is that Manton was without power to act; that he had no jurisdiction. In all of the cases that were referred to by the other side jurisdiction appears to have been conceded, but even here the Supreme Court says: "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. * * * So a departure from established modes of procedure will often render the judgment void." 28

Language that is even more appropriate occurs in the case of *Boyer* vs. *Boyer*, in 129 Appellate Division, 647. In that case, a very important case, because it is like this—— 287

The Court: That is a New York State case?

Mr. Franklin: Yes. That is the New York State Appellate Division case, *Boyer* vs. *Boyer*, referred to on page 2 of the supplemental brief. I want to say first that the language I have just quoted from the *McVeigh* case was approved and made much stronger, although I have not quoted from it except to refer to the case, in the case of *United States* vs. *Walker*, where they also rely on Supreme Court authorities. That case is in 109 U. S., 258, at page 277.

In this *Boyer* case the Court said: "Procedure in disregard of these provisions is not a mere irregularity. (Referring to Rule 73). Such procedure is unquestionably void. * * * nor was the rule established for the benefit of the parties to matrimonial actions, but for public good."

Now, I think your Honor should be referred at this point to a case that was of very great interest to lawyers, involving Mr. Justice Ford of the Supreme Court, who objected because he was not assigned to particular parts.

The Court: I remember that.

Mr. Franklin: And that case went to the Appellate Division, and then it went to the Court of Appeals. We have a situation there somewhat analogous to what we find here, and the Court of Appeals said that Mr. Justice Ford when assigned must obey the rules regarding assignments. He could not even attack them. That case was mentioned, and I won't take the time and trouble to go into it. The Court said there:

"The power to distribute the work of the Court among the twenty-eight trial justices of the First Department must of necessity rest somewhere. The object of its exercise is to secure the highest degree of efficiency in the administration of justice and so promote the interest of the public. Upon the justices of the Appellate Division the power of allotment of the work has been conferred by the Constitution and it is their duty to exercise it according to their best judgment."

When we get down to the point that the other side has made so much of, on the point of collateral attack, there are any number of cases and I refer your Honor to a few which say that where the jurisdiction is lacking, or where there is a lack of power to act you can always attack the proceeding in its entirety and collaterally.

I am reading now from the case of *Phebus* vs. *Search*, in 264 Federal, 407, a Circuit Court of Appeals case, Eighth Circuit, where the Court said:

"Judgments of courts, which at the time the judgments were rendered had no jurisdiction to consider or to determine the issues in the respective cases, and w[illegible]e records at such time disclosed such lack of jurisdiction, are absolutely void,"—that is the situation here —"and may be attacked and defeated collaterally."

I am not going to continue with the long list of cases, but I have given you a half dozen cases along that same line showing that a collateral attack is justified.

The Court: My first impression was that the legal nexus between you and your objective was the fact that the Interborough and Manhattan were both made defendants in your bills, were they not? 28

Mr. Franklin: Yes.

The Court: And what you want to do, as security holders, is to have other receivers appointed and the removal of the present ones on the ground that they were appointed without any legal authority.

Mr. Franklin: That is right. It is absolutely necessary. These gentlemen do not know it, but it is for their own good. It is insecure; it is built on quicksand.

The Court: It is what?

Mr. Franklin: It is built on quicksand. It is for their own interest to have it, so if the Court did nothing else here but to validate that proceeding, but to validate the things that have been done, it would be of inestimable value to them, rather than to have this thing come up and decided that way six months or perhaps a couple years hence. 288

If the Court please, your Honor has made certain suggestions, and the other side particularly have thought that we should have appeared before Judge Manton. Well, I did appear. I did not appear as any representative of any of the names that that gentleman referred to, and he had no right to say it. I appeared in behalf of myself, and I was also asked to represent 100,000 shares of stock, and, as I say, I myself owned 3500 shares. I was away. My assistant was away out of the City, but

384 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

they telegraphed me about the filing of the bill entitled Barber against these companies. I knew nothing of him. I understood an order to show cause had been granted. I asked to find out about the proceeding, and I came to court and these facts are alleged in my original bill. The trouble with the other side is that they have not read the papers. That is all referred to on page 15-a of my original bill.

I went there for the purpose of asking Judge Manton, without knowing what he had done, without knowing about these peculiar orders that I do not think can
385 stand, I went there expecting to make some sort of an argument in support of an appointee that I thought, a man whom I hardly knew, Mr. Amster, whom I hardly knew because I had known of his record in the Rock Island matter, in the Boston and Maine matter, and I knew what he did for Manhattan stockholders three years ago, and I intended to make an argument on that order to show cause which was returnable before Judge Manton at ten-thirty in the morning. I got there at ten o'clock to be sure that I would be on time and perhaps learn something about the case that would be of interest. I was told at ten o'clock in the morning that Mr. Roberts
386 was going to be appointed, a half an hour before the return of the order to show cause, and then I found out that there was a meeting of directors of the Manhattan Railway Company called for eleven-fifteen to ratify the action that the Manhattan had taken, and they could not hold the meeting because Mr. Roberts was in court, and he is the president of the Company, and these directors were told, while they were sitting there, "Why, you know Mr. Roberts has been appointed." When ten-thirty came I did file an intervention, not on behalf—let me make this very plain. I did not represent Mr. Johnson in that case and it is very unfair for the other side not to fully explain that to the Court——

The Court: You represented yourself?

Mr. Franklin: I represented myself, and that is really what I was there for. I was asked to represent a Manhattan stockholders' committee but I filed the intervention, and I found that Judge Manton said, "Well, I am not going to take any cognizance of it. There is nothing I am going to do on this Barber bill. I have already decided on a receivership for Manhattan on an intervention filed later by Manhattan. Therefore I am going to take no action in this case of any kind."

I never even prepared a petition in the Brake Shoe case, but I did think my rights would be properly pro- 288
tected if I filed an intervention in the Barber case.

The Court: We are dealing with the question of jurisdiction. Let us deal with that.

Mr. Franklin: Your Honor will find on page 15a, notwithstanding the statement of the other side, a full statement of the facts. This is an equity bill. It was prepared carefully with a view of entire frankness, and I even mention the title of the case and show what was done and show everything about it, but for them to go ahead and make statements of that kind is entirely unworthy.

Now your Honor has made the statement in the course 2889
of the argument that we possibly could not intervene in the I. R. T. case because such an intervention would be insubordination to and in recognition of the propriety of the main proceeding. We could not do that, and when I found Judge Manton disregarded that whole thing and simply threw us out of court,—he never honored the petition of intervention as the other side allege that paper was thrown out,—then I began to look into the thing and my first thought was to intervene in the American Brake Shoe Company case but I was met with Rule 37 of the Equity Rules. I was also met with the decision of United States *against* California Canneries, 247 U. S.

And I was met with other cases, and I could not go and say this Judge had no power and make the attack I make in my bills and my brief and supplementary brief, and I would not have had the record I wanted.

I think your Honor knows, and certainly knew very well, Mr. Maxwell Evarts, and other of my associates for many years. This proceeding is brought with the utmost good faith. It is brought with the utmost sincerity. It is a good bill, and I think it will stand. I have given you the law on the subject and I am not going to go into many more cases. There are a great deal more
2891 that would make these hardened gentlemen blush, as to what did happen, but I am not going to do it.

The Court: I am not interested in that phase of it.

Mr. Franklin: I am not going to do it, but I want your Honor to know that this bill is perfectly able to stand on its own feet, both as to the facts and as to the law, and I most earnestly request your Honor to carefully read our main brief, and our supplemental brief, and the bills as filed. I served copies on the other side.

The Court: You do not suppose I am not going to read the papers in a case like this?

Mr. Franklin: Of course. Particularly the cases. It is not surprising, really, for me to make the suggestion,
2892 because these gentlemen could not have read the papers and they could not have read the briefs.

The Court: The only difference between counsel and the Judge is that counsel has no responsibility and the Judge has all the responsibility.

Mr. Franklin: Yes, I want to say, if the Court please, I personally feel a great sense of gratitude that this case is being submitted to your Honor, because your Honor's fairness and your Honor's large experience long before you came on the bench was such that lawyers everywhere have known of your splendid work and it is right that a case of this importance should be submitted to you for determination.

Mr. Boehm: May it please your Honor, I too have been practicing for many years before this court; for 28 years last February, and this is the first time also that an attack has been made such as has been made by Mr. Stryker upon my good faith and upon my motives, and with such little justification, as in this case.

Of course counsel does not state what his own motives were in making the attack, which was to becloud the issue and to prejudice the Court against the complainant and against myself on this litigation. That, of course, was his obvious purpose, but that he has not mentioned. But so far as my own good faith and motives are concerned, Lillian Boehm, my wife, and I have for a number of years owned securities of both the Manhattan and the Interborough, which today have a par value of $360,000. I wish we did not own them. I think under those conditions I was certainly entitled to represent her and to represent myself upon a proceeding of this kind. Of course I had no notice whatever of the ex parte application that was made in the American Brake Shoe case upon a $27,000 claim for goods sold and delivered, which the Interborough was perfectly well able to pay, because it had $5,000,000 in the bank at that time. I had no knowledge that such an application would be presented ex parte, and that the Interborough would, ex parte, appear before a Judge selected by the parties in advance, as is shown by the orders that have been made here, for the purpose of appointing a receiver or receivers satisfactory to them, and I did not even know of the bill in the Barber case; never knew or heard of Mr. Lawrence Berenson even until, I think, two or three days before the return day of the order to show cause in the Barber bill when a friend of mine who happened to know of that bill told me that such a motion was being made returnable before Judge Manton, and thereupon, in view of the large interests that both Mrs. Boehm and I had, I appeared upon the return of that order to show cause.

I did not inquire into the question of Judge Manton's jurisdiction. I assumed that Judge Manton had jurisdiction; that he would not make an order appointing receivers of a vast property like the Interborough, unless he had jurisdiction; that he would not entertain the bill in the Barber case unless he had jurisdiction, and I took it for granted that he had jurisdiction and we appeared on that assumption, and when we were ushered into Judge Manton's chambers we were calmly told that Judge Manton had already appointed a receiver of the Manhattan Railway Company in another ex parte application made by the Manhattan Railway Company itself, upon an alleged meeting of the Board of Directors, held a day or two previously, which, I understand, was irregular, and they afterwards had a meeting the same day, later on, to ratify what had been done, and he said, "I have already appointed Mr. Roberts, the President of the Manhattan Railway Company, as receiver." Therefore I stated I represented 10,000 shares of stock and about $140,000 of bonds and we were desirous of accomplishing upon this application the appointment of receivers who would be independent of the Interborough interests, because it is my belief, and the belief of others who are familiar with this situation——

The Court: What are you reading from now?

Mr. Boehm: From what happened before Judge Manton. This is a stenographic transcript.

The Court: Is that in here?

Mr. Boehm: That is contained on page 14 of Nichols' affidavit. You have that. (Continuing reading):

"The Court: You have that, the president of the Manhattan.

"Mr. Boehm; Unfortunately, we don't consider him sufficiently independent of the Interborough interests because under his management and under the management of the present board of directors we feel that the interests of the Manhattan have been neglected."

I then went on to tell the Court, or Judge Manton, at least, in what respect their interests were neglected, but the rest of my remarks were deleted and are not contained in this affidavit; that the physical properties were allowed to run down of the Interborough; that no accounting was filed of the moneys due to the Manhattan, or no separate accounts were kept of the income of the Manhattan Railway as separated from the entire elevated division which included unprofitable extensions of the Interborough Rapid Transit Company. Those were the things mentioned to Judge Manton and, of course, no relief was granted. A petition for intervention was presented and 290
never acted upon by Judge Manton.

Now under those circumstances surely a stockholder owning $360,000 of these securities is entitled to take some steps to protect his interests and these are the steps that we have taken here, and the attack which was made by Mr. Stryker is not only untruthful, but it is most unfair and actuated by most unworthy motives.

Now on the question of jurisdiction, which is really the main question, and really the only question before your Honor, I would like to call to your Honor's attention a decision of Judge Lacombe in the case of Pennsylvania Steel Company against the New York City Company in 221 Federal. 2901

The Court: In the brief?

Mr. Boehm: Oh, yes. It is in the brief. Where Judge Lacombe appointed himself to hold a District Court, and in that case he sets forth the history of this particular section of the Judicial Code which Mr. Guthrie has exalted to the skies as something conferring almost divine powers on the Senior Circuit Judge of this Circuit. Here is what Judge Lacombe says in regard to the history:

"This provision for designation of a Circuit Judge was not in the original bill"—that is the original bill in

Congress—"which on its passage constituted the Judicial Code. It was inserted while such bill was under consideration in Congress, on application of the United States Attorney for the Southern District of New York. Attention was called to the fact that, on whatever day the existence of the Circuit Court should terminate——"

The Court: January 1, 1912?

Mr. Boehm (continuing reading): "Whatever day the existence of the Circuit Court should terminate and its business be transferred to the District Court, there would probably be found on the equity side of the court suits which had been in part tried and disposed of by interlocutory decrees or decretal orders before some Circuit Judge, but in which his work had not yet been terminated by final decree. It was suggested that in such cases it would be better, involving less delay, if the Circuit Judge were allowed to finish his incomplete work, rather than to require a District Judge to take up the unfinished cause and familiarize himself with its prior history. It was also suggested that, at least in this District there would sometimes be occasions when the business of the court, increased as it was by old Circuit Court work, part of which had been theretofore done by Circuit Judges, might be so great that the District Judges could not promptly dispose of it, while at the same time some of the Circuit Judges might be able to spare time from the work of the Circuit Court of Appeals. These suggestions apparently commended themselves to Congress, for the bill was amended so as to include the provision above quoted."

That shows plainly what the purpose of Section 23 of the Judicial Code was, namely, to complete unfinished business, and where the business of the Court had become congested, and the Circuit Judges did not have enough work to do, that a Circuit Judge might be assigned to assist the District Court Judges in the disposi-

tion of their work, and it was not put in because Congress thought that the District Court Judges were not competent enough in an important case to pass upon applications for the appointment of receivers. It was put in for the expedition of business, as I said in my original argument.

Of course in the case in which Judge Lacombe wrote this opinion I might say that he designated himself only because he had originally taken jurisdiction of the case as a Circuit Court Judge, when the Circuit Court had jurisdiction of such applications and the reason that he said he continued himself was that it was unfinished business; he was familiar with the case, and he thought that, therefore, he should finish the case which he had begun. Which is an entirely different situation than here where we have an original application made to the Senior Circuit Court Judge, no application having been made to any District Judge. 290

Now it seems to me that our opponents are blowing both hot and cold in this case. In one breath they contend that Judge Manton is sitting as a District Judge, and therefore has a right to disagree with the other District Judges as to distribution of business, and in the next breath they contend he is not sitting as a District Judge; he is sitting as a Circuit Judge. Both contentions cannot be sound, and neither contention, in my opinion, is sound. As a matter of fact if he is sitting as a District Judge, I think Section 731 of the Revised Statutes provides: "The District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under Section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their 290

own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." Now that means the District Court sitting as a court. The Judges of the District Court, of course, constitute the Judges of that court. I personally think that under this rule a majority of the Judges could enact the rules, but that is not material here, because here we have a rule enacted unanimously by the eight Judges of the District Court. Now if he is an acting District Judge he certainly must conform to the rules of the District Court. There cannot be any question about that, because
909 this statute says that the District Court may make those rules.

The Court: Everybody agrees to that, but they claim the rules were not valid.

Mr. Boehm: Invalid for what reason, your Honor?

The Court: Well, I could not quite make out. At least it has not dawned on me.

Mr. Boehm: Now, on the other hand if he is sitting as a Circuit Judge, and he is not a District Judge at all, then we are met with the other statute which says that where the District Judges disagree as to the division of business, then the Circuit Judge may assign or divide
910 the business. Now if he is not a District Judge he cannot disagree with the other Distirct Judges as to the division of business, and if he cannot disagree with the other District Judges as to the division of business he has no power as Circuit Judge to assign the business of the District Court.

The Court: The whole point of the thing is about that Section 23, and that is that the Senior Circuit Judge has not any *locus standi*, to use our old phrase, to come into the thing at all unless there is a disagreement in the District Court, and the normal way for that to be exhibited to the Judge is, as it was in Case against

United States, to have the Judges report a disagreement and have him straighten it out. Of course there might be some situation where the circumstances would be so injurious that before either Judge brought it up he might intervene, but in normal circumstances in normal times or situations of disagreement, the normal method would be for the Judges to submit it to the Senior Circuit Court Judge. I think that is really the point on that assignment of himself in that second order. I do not think he ever got as far as having a right to make that sort of an order at all. That is my point.

Mr. Boehm: That is exactly my point, your Honor. 291

The Court: The first order I have not made up my mind on so clearly, but I am quite convinced that the second order was outside of that line.

Mr. Boehm: Well, the first order I think was invalid for two reasons: in the first place before Judge Manton could act under that statute which provides that if the public interests requires he may designate a Judge to sit in the District Court, there must be some color of public interest.

The Court: I know, Mr. Boehm, but you see the curious situation which differentiates the first order from the second is that in the first order they have a recital of public interest. 291

Mr. Boehm: He goes further, your Honor, in the first order. He actually in the first order designates that he shall hear this case.

The Court: Oh, yes, but he says that owing to some public interest he has to hear this case. Well, now, I should rather gravely doubt, if I may use a phrase which I love because I very seldom doubt about anything, but I should be very doubtful indeed if a District Judge, or anybody, could challenge a recital of that kind. There are certain kinds of recitals that you cannot go behind, and I think it is rather doubtful whether you could chal-

lenge that recital; but, on the other hand when you come to a statement that a disagreement exists in the District Court, why that is a definite question of fact, and I have here before me the allocation of business signed by all of the Judges; the summer business allocation signed by all the Judges in June and filed in this court on June 29, 1932, and it is part of the court records; also the assignment of the Judges for October, 1932 to June, 1933 signed by all the Judges, and filed in this court on June 29 also. Now there you have something that I know about, and I further know that there
915 was no request made to Judge Knox under the Rule 1, and that there was never any application made to Judge Patterson which would be a basis for going to somebody else with regard to the receivership. Those are facts that are right before me, and I have mentioned them just now because I want to put them on this typewritten record so as to have them there when any of us look at it again, and there they are.

So in that second order you have got a situation where the recital is something that we can challenge, because it is something that involves ourselves, and we know about, and, in fact, it is a confession practically that he went down to the District Court, and then the disagree-
916 ment was created by his going down there; whereas my point about his right to go down is that it is only under Section 23 when there is a disagreement that he has a right to go down and make an order such as that which he did make in what we call the second order. That is the whole point of the thing.

Mr. Boehm: Your Honor's opinion, then, is that Judge Manton may have had the power to designate himself to hold a District Court, but that he was then subject to the rules of the District Court and must transact such business as may be assigned to him by the Senior District Judge?

The Court: I won't say that is my opinion, but in arguendo that is what I am saying. I do not know that you could challenge the recital in that first order.

Mr. Boehm: Of course that is the question. Personally I do not think there was any public interest.

The Court: That is your personal opinion. Suppose he had a different opinion of his own?

Mr. Boehm: I mean there must be some facts or some color or basis for that recital.

The Court: I do not know. I have not looked at all these affidavits.

Mr. Boehm: Nothing has been suggested up to this 291
time by counsel which would indicate any public interest.

The Court: I do not know that they have to. I do not see how you could do it. You have to remember there might be occasions when a certain Judge wanted to come down, and he did not want to state anything except public interest. I cannot imagine such a thing, but there might be cases where he wanted to do it with a certain degree of readiness, and I do not know but what that is a bit of judicial administration which you cannot go behind. I am rather inclined to feel that way, but, on the other hand, when you come down to something that is right before us in our own court, a recital like that, then, of course we know that there was not a disagreement. 291

Mr. Boehm: Now, with regard to the rules of the court of the district, and their effect, I would like to call your Honor's attention to the case of Shepard *v.* Adams, in 168 U. S., in which the District Court of Colorado, I think it was, enacted a rule that answers must be filed within ten days. The State Court practice provided that answers might be filed within thirty days. Your Honor, of course, is familiar with the Conformity Act?

The Court: The Conformity Act, yes.

Mr. Boehm: Still the United States Supreme Court held in that case that the District Court, in spite of that

2920 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Conformity Act had the right to make a rule for itself under which answers must be filed within ten days, and that that rule had the force of law, in spite of the Conformity Act, and the Supreme Court there said:

"We think it is sufficiently made to appear by these citations from the statutes that, while it was the purpose of Congress to bring about a general uniformity in Federal and State proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by State legislation, yet that it was also the intention to reach such uniformity largely
2921 through the discretion of the Federal Courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

And then they went on to say:

"We have a right to presume that the discretion of the District Court was legitimately exercised in both adopting and maintaining the rule in question."

Now if the District Court has a right to make rules which are really in violation of the Conformity Act, certainly the District Court has a right to make rules which
2922 are entirely in conformity with the Supreme Court rules and with the statute.

The Court: Well, yes, I think myself that the way this thing boils down and all lawyers usually find at the end of a day like this that it does boil down, that there are two real questions here to determine, and one is the *locus standi* of collateral attack. I think that is the initial thing on your side, and the other thing is, supposing everything were true that you have been arguing about; supposing Judge Manton could have issued that first order appointing himself the District Judge, and after having done that he came down and put the other order in, perhaps to get rid of those rules or had some

ground for redistributing the business and get himself in the Motion Part so he could conform to Rule 11-a,—we will say there was that reason; there was a rationale of some kind for it, of course, and when that was done, and he made this appointment, the question is what the effect of that was; did he have the power to do it although it was an irregular exercise of it? Or did he not have any power at all?

Mr. Boehm. May I interrupt your Honor at this moment?

The Court: Yes.

Mr. Boehm: If he violated the rules of the District Court if he was subject to the rules of the District Court, he could do nothing in violation of those rules; if he is superior to the rules, if by virtue of his office as Circuit Judge one can say he is superior to anything that the District Court may do; that he is a superior being and is in no way bound by the rules of the District Court, then, of course, he had the power to do it.

The Court: This decision in the Galveston suit said that the Circuit Court of Appeals were bound by the rules of the District Court if they, in a sense, involved the litigation before them.

Mr. Boehm: This was in the District Court and not the Circuit Court, and he appointed himself to hold a term of the District Court for the purpose of holding that litigation, and once he steps down and becomes an Acting District Judge, as they themselves have said he becomes one, he becomes an Acting District Judge and he is bound by the rules of the District Court, and those rules have the force of law. If Congress passed that rule it would have no greater effect than if the District Court passed the rule, and if he violates an act of Congress and does something he should not do he is without power. That is not an abuse of power. That is without power. He may not disregard the law. He must

conform to the law. His actions and orders must be under the law and not in violation of the law. That is the crux of the matter, I think.

The Court: I think that is too, and you are right to raise the question collaterally. Of course in consent receivership, I don't know, with intervenors, I can't imagine who could raise the question by appeal.

Mr. Franklin: Your Honor, there wasn't any question before the Court.

The Court: What?

Mr. Franklin: There wasn't any question before the Court.

The Court: I understand. I am not talking about you people now, but I am saying I don't know how the question could be raised.

Mr. Boehm: It cannot be if in the Interborough and the American Brake Shoe case we must be subject or subordinate to the bill.

The Court: And with all the people assembled in that case, there would be nobody to appeal on the question of law here involved.

Mr. Boehm: Exactly. The Interborough Rapid Transit and the banking interests think that they can get together with the American Brake Shoe Company with a $27,000 claim and shut out everybody else, they go to a Judge satisfactory to them and they have receivers appointed and nobody else has anything else to say.

Mr. Tuttle: Well, I would take exception to that.

Mr. Boehm: Well, that is the practical effect.

Mr. Tuttle: No, it is not.

The Court: There is an order to show cause.

Mr. Tuttle: Yes, there was, and these gentlemen wont deny they knew about that order to show cause which was published in the newspapers.

The Court: Oh, yes.

Mr Tuttle: And that gave them an opportunity, which other people did embrace, to appear and come in to object to the receivership.

Mr. Boehm: But the receivers were appointed without notice.

Mr. Tuttle: Whether they were appointed without notice or not, there was the opportunity extended by Judge Manton before he decided, to be heard, as to why there should not be a continuance, and they have all been heard.

The Court: Oh, yes, I know.

Mr. Boehm: But they had no standing, they were 293
merely heard through the courtesy of the Judge, they had no standing in the action and could not take any appeal from his order.

The Court: Well, nobody ever raised this point at all in any way until you gentlemen came in with this separate receiver, this separate bill, did they? You did not raise it and nobody else raised it that you know of.

Mr. Boehm: And now when we come to the situation that we claim he is acting without jurisdiction and has no right and no power to act, ~~it~~ it is not the proper place for us to come, to the Motion Part of the District Court where applications of this kind must be heard. Isn't that 2931
the proper procedure?

The Court: You have to come here first anyway, there is no doubt about that. Of course then I could assign you to any Judge.

Mr. Boehm: Now then, your Honor, as to the right to appoint receivers under this bill, as your Honor has stated, we already have the confession of the defendants, both defendants, that receivers should be appointed, that they are insolvent. It is not the rule, as I understand it, in a case of a public service corporation, that the Court can only appoint receivers upon the confession of the defendant. That may be true with other corporations,

but it is not true with regard to public service corporations. In the case of public service corporations where the public interest is involved, as well as the private interests are involved, the Court, where the corporation is insolvent, where it has defaulted in the payment of its obligations, as the Interborough has, has the right to appoint receivers upon notice to the defendant, and receivers have been appointed in cases of that kind, in the case of the Philadelphia Rapid Transit Company, which is upon our brief. But aside from that, as I have said, this Court will look to the substance and not to the form.
933 In this action we have every party to the American Brake Shoe case included as a party defendant here; every party that was before the Court in the American Brake Shoe case is before the Court in this case. In the Brake Shoe case an answer was filed by the Interborough admitting its insolvency and consenting to the appointment of a receiver. In the same case an answer was filed, or rather a petition was filed for the Manhattan Railway Company, admitting its insolvency and asking for the appointment of receivers. So we have these answers and these confessions right here in this court, they are on file here and your Honor cannot ignore them. They cannot blow hot and blow cold and say well, we admitted it
934 there, but only for the purpose of that case. This court is interested——

The Court: I made that answer myself, didn't I?

Mr. Boehm: Yes.

The Court: What they regarded as an answer.

Mr. Boehm: May I just ask your Honor, we have been served with a lot of affidavits, we had not had a chance to read them, just glanced over them, and we would like to reply to any new matter which is contained in those affidavits.

The Court: I am going to try to do something on this thing on Saturday, the only time I have available. I

have got the motion calendar all day tomorrow. And possibly Sunday and possibly Monday, so you will have to get what you want to get in by Saturday morning.

Mr. Boehm: At what time, your Honor?

The Court: Why, say, about half past—well, say eleven to twelve, something like that.

Mr. Boehm: Yes.

Mr. Tuttle: If the Court please, I just want to point out one consideration. Your Honor has frequently referred to the fact that Mrs. Boehm is an intervenor as aiding perhaps what you call the *locus standi* here.

The Court: In the Interborough only. 293

Mr. Tuttle: Yes. I want to leave this thought with you. She is a resident of New York. So far as she is concerned, there is no diversity of citizenship.

Mr. Boehm: Does not——

Mr. Tuttle: Will the gentleman allow me just to finish my sentence?

The Court: Go on. You won't be interrupted.

Mr. Tuttle: We have taken the position, and we believe it to be thoroughly sound, that so far as that Johnson bill is concerned, it does not establish any jurisdiction in this court whatever, and there is no rule that is more than a handbook rule that where there is an intervention which itself would not give jurisdiction in a bill 2937
which does not establish jurisdiction, that intervention adds nothing to the situation.

The Court: I know, but if the bill has jurisdiction the intervention need not have jurisdiction.

Mr. Franklin: That is right.

Mr. Tuttle: Your Honor will recall our argument on this question of *locus standi*. We say that bill of Johnson's gives no jurisdiction to this situation and therefore the intervention does not apply.

The Court: Of course then you have three questions; first, the validity of that bill.

2938 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Mr. Tuttle: Yes.

The Court: That you want to raise that in the case of the intervention; and the second is the right of collateral attack, isn't that the second one?

Mr. Tuttle: That is one of them.

The Court: And the third one is——

Mr. Tuttle: Is the validity, so far as this hearing is concerned, of the orders made by Judge Manton. Your Honor stated that our position was that these rules, so-called, were invalid. That is not all of our position. Valid or invalid, and we do claim that they are invalid,
2939 but valid or invalid, we also claim that they are not applicable to a Circuit Judge acting under that designation.

Now, your Honor may or may not agree with me, but I want the record straight as to what our position is.

Now I am not sure that I have all the briefs. All I have received is a brief, without any back on it, purporting to be the main brief for Johnson.

The Court: There is a heavy brief.

Mr. Franklin: Do you want a brief with a back on it?

Mr. Tuttle: Please don't play with me. I do want to be sure that I get everything. Has Mr. Boehm a brief?

Mr. Boehm: I haven't as yet.

2940 Mr. Tuttle: I understand. Now may I have a copy of that supplemental brief?

Mr. Stryker: If your Honor please, just before you adjourn, may I read one citation?

The Court: Don't go into any oration.

Mr. Stryker: I am not going to.

The Court: What do you want to say?

Mr. Stryker: I just want to call your Honor's attention in the Barber case to the allegation in paragraph 1 thereof, in Exhibit C before you here, that the defend-

ants Manhattan and Interborough Rapid Transit Company, hereinafter called Interborough, are street railway corporations duly organized under the laws of the State of New York, and are citizens of the State of New York; the aforesaid Victor Dowling and Thomas E. Murray are residents of the State of New York and duly appointed temporary receivers of Interborough by order of the Court on August 26, 1932. Application is hereby made to this Honorable Court to join the said Dowling and Murray as Receivers of Interborough as parties defendant in the above entitled case and for leave to sue Interborough.

The Court: I heard that.

Mr. Stryker: Now I want just a minute, if your Honor please. If your Honor will turn now to page 46 of that exhibit, which is the petition of Mr. Charles Franklin, who is the solicitor for the complainant in this case.

Mr. Franklin: No.

Mr. Stryker: Am I wrong about that?

The Court: Who is solicitor for plaintiff?

Mr. Stryker: Who was solicitor for plaintiff in the Johnson case.

Mr. Franklin: I am the solicitor in that case, of course.

Mr. Stryker: That is what I say.

The Court: What page is it on?

Mr. Stryker: Page 46. At page 47, the third paragraph, about two-thirds down, "I am familiar with the facts contained in the original and supplemental bills in the pending equity receivership for the Manhattan Railway Company, and, upon information and belief, I aver that the facts and allegations therein contained are true as there set forth. Petitioner desires to intervene in said action and become party plaintiffs thereto."

2944 *Minutes of Hearing Before Woolsey, J., October 6, 1932.*

Mr. Boehm: That is true. That was in August and we did not know anything about it, we knew nothing about the jurisdictional question, and that is why we came here.

Mr. Tuttle: Then we have until some time Saturday morning?

The Court: Saturday morning.

(Hearing closed.)

2945

2946

Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Before: HON. JOHN M. WOOLSEY, District Judge.

BENJAMIN F. JOHNSON, Complainant, *vs.* MANHATTAN RAILWAY COMPANY, et al., Defendants.	E. 71-153.
BENJAMIN F. JOHNSON, Complainant, *vs.* MANHATTAN RAILWAY COMPANY, et al., Defendants.	E. 71-153.
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, *vs.* INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	CONSOLIDATED CAUSE. E. 70-364.
IN THE MATTER *of* INTERBOROUGH RAPID TRANSIT COMPANY-MANHATTAN RAILWAY COMPANY Receivership.	

NEW YORK, October 18, 1932, 2:30 p. m.
(In Chambers.)

APPEARANCES:

CHARLES FRANKLIN, ESQ., Solicitor for Complainant.
LOUIS BOEHM, ESQ., Solicitor and Counsel for Lillian Boehm, intervenor.

2950 *Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.*

HORNBLOWER, MILLER, MILLER & BOSTON, ESQRS., Solicitors for Receivers of the Interborough Rapid Transit Company;
NATHAN L. MILLER, ESQ.,
CARL M. OWEN, ESQ., and
HAROLD J. GALLAGHER, ESQ., of Counsel.

ROOT, CLARK & BUCKNER, ESQRS., Solicitors for Committee of 6% unsecured notes of the Interborough Rapid Transit Company, of which
2951 Charles Hayden is Claimant;
CLOYD LAPORTE, ESQ., of Counsel.

BREED, ABBOTT & MORGAN, ESQRS., Solicitors for The American Brake Shoe and Foundry Company, Complainant;
CHARLES H. TUTTLE, ESQ., of Counsel.

HUGHES, SCHURMAN & DWIGHT, ESQRS., Solicitors for William Roberts, Receiver of Manhattan Railway Company;
CHARLES E. HUGHES, JR., ESQ., of Counsel.

JAMES L. QUACKENBUSH, ESQ., Solicitor for the Interborough Rapid Transit Company.

2952

ARTHUR J. W. HILLY, ESQ., Corporation Counsel of The City of New York;
F. E. CARSTARPHEN, ESQ.,
EDGAR J. KOHLER, ESQ., and
HARRY HERTZOFF, ESQ., of Counsel.

COTTON, FRANKLIN, WRIGHT & GORDON, ESQRS., Solicitors for Protective Committee of Manhattan Consolidated 4's;
CLIFTON MURPHY, ESQ., and
B. C. WRIGHT, ESQ., of Counsel.

Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders. 2953

LAWRENCE BERENSON, ESQ., Solicitor for Complainant in an action entitled Barber vs. Manhattan Elevated R. R. Co., the Interborough Rapid Transit Company and the Receivers of the Interborough Rapid Transit Co.

LOUIS B. WEHLE, ESQ., Solicitor for the Guaranteed Stock Stockholders Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED, ESQRS., Solicitors for the 7% Noteholders' Committee and 5% Bondholders' Committee, both Committees of Interborough Rapid Transit Company securities; 2954

EDWIN S. S. SUNDERLAND, ESQ., of Counsel.

DAVIES, AUERBACH & CORNELL, ESQRS., Solicitors for Central Hanover Bank & Trust Company;
HAROLD C. MCCOLLOM, ESQ., and
MARTIN A. SCHENCK, ESQ., of Counsel.

ELON S. HOBBS, ESQ., Solicitor for Independent Security Holders who have not filed their securities with Protective Committee, but have filed a petition.

MR. FOLLMER, Deputy Clerk of the United States District Court for the Southern District of New York. 2955

The Court: This is on the settlement of the orders. Under my decision the first order is an order of consolidation of The American Brake Shoe and Foundry Company against Interborough Rapid Transit Company-Manhattan Railway Company, intervenor, Equity No. 70-364, with this cause, Johnson against Manhattan Railway, Equity No. 71-153, under the short caption, In the

2956 *Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.*

Matter of the Interborough-Manhattan Receivership Proceedings. Has that order been presented for settlement?

Mr. Follmer: I have the order here. It was presented to the Clerk in the Clerk's office.

Mr. Franklin: That has been served on all parties.

The Court: Is there any counter-order on that?

Mr. Tuttle: If your Honor please, there is no counter-order, but we desire to ask your Honor to make two insertions in the order, which we believe to be highly con-
2957 sonant with your Honor's opinion and also consonant with the facts.

In the first place, and in order that I might have it in convenient form, we have written out the suggestion that we would propose for your Honor's consideration. The words, "and on its own initiative" are taken from the opinion (handing papers), and the other words simply record the fact, which otherwise does not appear, that we, of course, oppose the consolidation order. You see, there was no motion for consolidation, and consequently our opposition, up to this point, has not been made a formal matter of record, and we would like to have it
2958 appear as such in the order.

The Court: I do not see the words "on its own initiative". Have you given those particular words? Oh, yes, that is right. I have got it. You are right.

Mr. Boehm: My suggestion would be, if your Honor please, that perhaps the best way to handle that situation would be to insert after the words, "The Court", before the words "It is ordered", "The Court, upon its own motion, being fully advised in the premises, it is ordered, adjudged and decreed", and then, of course, if an appeal is taken from that order, the appeal itself will show that that order was not made with the consent of the defendants.

Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.

Mr. Tuttle: Well, I cannot imagine that there could be objection, effective objection, to including in the order a provision that it was over our objection. We do not wish to have any doubt about that. And the Supreme Court has, in certain cases, been somewhat technical in considering any appeals where the orders that were the subject of the appeal do not recite the exact position of the parties.

Mr. Franklin: Of course there was no objection and could be no objection on the part of the defendants up to the present time, and are not the defendants' rights fully protected by their noting their objection and exception at this time?

The Court: Yes, but of course it has got to be on the record in some way. That is the point that Mr. Tuttle is making. Now just wait a minute. (Examining papers). Wouldn't this do it, by a recital at the beginning of this order of consolidation, if you said, "The Court being fully advised in the premises, on its own initiative and over the objection of the defendants in Equity No. 71-153, and of the complainant in Equity No. 70-364"—the defendants in both those actions. That makes it a little easier.

Mr. Franklin: Yes, that would be satisfactory.

Mr. Tuttle: Will your Honor be good enough to repeat that?

The Court: Yes, I will. Have it read, "The Court, being fully advised in the premises", and then proceed, "on its own initiative and over the objection of the defendants in Equity No. 71-153 and Equity No. 70-364, and of the complainant in Equity No. 70-364", because I think the defendants, if they are defendants in Equity No. 71-153, it would cover the whole thing without——

Mr. Tuttle: (Interrupting) The only suggestion I have with reference to your Honor's language is this:

962 *Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.*

as you will see from the next order that is being submitted, there are a number of persons and interests who have been allowed to intervene in the Interborough suit and are not parties defendant in the caption.

The Court: Yes. All right.

Mr. Tuttle: They wish a standing.

The Court: "On its own initiative and over the objection of the defendants in Equity No. 71-153 and of all the parties in Equity No. 70-364."

963 Mr. Wehle: May I say a word on that, your Honor?

The Court: Yes, Mr. Wehle.

Mr. Wehle: Representing the 7% Guaranteed Stock Holders Protective Committee, we do not wish to be on record as objecting to the entry of this order of consolidation.

The Court: Well, now, is that a regular intervenor?

Mr. Wehle: We are intervenors.

Mr. Boehm: Yes, they are a regular intervenor. Wouldn't it be better—after all, Mr. Tuttle can only speak for his own client—wouldn't it be better to mention, just as your Honor originally had it, "over the objection of the defendants in this cause and of the complainant in
964 Equity No. 70-364"; and it seems to me that would amply protect the rights of Mr. Tuttle's clients in this situation.

Mr. Tuttle: Of course, I am not authorized to speak, simply because I am attorney for the complainant, for anybody but the complainant, but I know there are several intervenors, and certain of those intervenors, and, I assumed, all of them, had joined. Now we find that one does not.

Mr. Wehle: If your Honor please, I spoke to counsel for one of the other intervenors only an hour or two ago, and he told me that he had not decided to take any position at all.

Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.

Mr. Tuttle: Well, it is perfectly easy, as all the intervenors are here, to call the roll of those that are known and now here as intervenors, and find out who does and who does not, and we will have a record.

Mr. Boehm: Is that all necessary?

The Court: I do not think it is.

Now, "without protest", I presume that is all right; he maintains his protest—I mean that the parties to that cause and the receivers, who are covered by that, and defendants in this cause, if they object, it does not make any difference whether the intervenors object or not, they have to come along under the equity rule.

Mr. Tuttle: Well, if none of the intervenors who are intervenors, as such, desire at this time and place to make any request of your Honor, of course I am not making any request for them. I understood that they did desire——

The Court: What is the use of cumbering up the record with a lot of recitals like that when, whatever the parties do in the case, the intervenors have to go along with them, under the equity rule. They are subject to all those things, aren't they? They may have intersese, interstitial relations of controversy between one intervenor and the other, and between the defendants and the intervenors, but as to the case generally, they just go along, don't they?

Mr. Tuttle: Well, of course, they were intervenors in the Interborough suit.

The Court: Yes, exactly.

Mr. Tuttle: And they consequently, by that intervention, take the situation of that suit. Now your Honor has consolidated them.

The Court: Yes.

Mr. Tuttle: And that produces a rather novel situation.

Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.

The Court: Quite.

Mr. Tuttle: And consequently I had judged from the desires expressed to me by certain of their counsel, that they should be included in that recital of objection, but if they do not wish to press it, I am not here to press it for them.

Mr. Franklin: May I suggest that your Honor examine 71 of the equity rules, which is intended to simplify this procedure, and we tried to follow that rule, and I think we ought to keep the order as simple as possible. That is a quotation of the rule governing the matter.

The Court: Yes, but you see Mr. Tuttle's point is one that I would not feel that it was appropriate for me to overrule him on. He wants to record objection, you see, and if I enter this order without any objection at all, he says that some higher court might say, "Well, there was no objection to this whatever", and there is no record of any objection.

Mr. Boehm: The point we make is that Mr. Tuttle should not speak for intervenors. They are represented by counsel and they were served.

The Court: He says he was not intending to.

Mr. Tuttle: Mr. Boehm need not make that point at all. That point of order is sustained by myself.

The Court: Mr. Sunderland wants to speak. What is it, Mr. Sunderland?

Mr. Sunderland: In behalf of the intervenors, the 7% Secured Noteholders' Committee, and the 5% Bondholders' Committee and in behalf of the Trustee of the 5% Mortgage which, pursuant to order to show cause in E. 70-364, was made a party, I desire to have the objection of those intervenors, the first two mentioned, and the Trustee as a party, recorded to the entry of an order consolidating that cause with the cause 71-153.

Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.

Mr. McCollom: On behalf of the Central Hanover Bank and Trust Company, as Trustee of the Consolidated Mortgage of the Manhattan Railway Company, which is an intervenor in cause No. E. 70-364, we should like to have our objection noted to the order of consolidation.

The Court: Well, then, you are the only one, Mr. Wehle, your intervenors—your intervenors are the only ones.

Mr. Wehle: Yes, we are intervenors, and we do not take any position.

The Court: What is the title of your concern?

Mr. Wehle: Harold Palmer and others, as a Protective Committee for the Manhattan Railway Company 7% Guaranteed Stock.

The Court: Oh, well, Harold Palmer and others, 7% Guaranteed Stock——

Mr. Wehle: Of Manhattan Railway.

The Court: Harold Palmer, et al., Manhattan Railway Company 7% Guaranteed Stock; is that the way you express it?

Mr. Wehle: Yes; Manhattan Railway Guaranteed Stock.

Mr. Wright: On behalf of the Protective Committee representing the Manhattan Railway Company Consolidated Mortgage 4% Bonds, of which Committee P. S. Earl Smith is Chairman, we would like to be recorded as opposing the entry of the consolidation order.

The Court: Well, you see, I am trying to find out who does not oppose. I am not making a record in the way of everybody that does oppose, I am just going to fix it so that people that do not oppose are down here.

Mr. Wright: I am sorry. I thought you had asked for those who do oppose.

Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.

The Court: Now does this cover the situation as you gentlemen understand it: "The Court, being fully advised in the premises, and on its own initiative, against the objection and protest of the defendants above named and of The American Brake Shoe and Foundry Company, complainant in the second above entitled cause, E. 70-364, and the intervenors in said last mentioned cause, with the exception of Harold Palmer, et al., the Protective Committee of the Manhattan Railway Guaranteed Stock".

Mr. Tutlle: That expresses our thoughts.

The Court: That expresses it? Now, I would not consider for a minute not allowing you to have any basis that you wanted to for challenging my order, so that I think I will have this put in, and let's see how I can do that best.

Mr. Franklin: Put it in as a rider, and we will have it rewritten and submit extra copies.

The Court: Oh, I am going to sign and settle this now.

Mr. Hobbs: If your Honor please, I do not want to sit here and have it understood that those who undertook to intervene in the first suit to object to the proceedings and object to a receivership are objecting to this. We favor consolidation.

The Court: Yes, I know, but I don't want anybody that favors it, I want to find out who objects to it.

Mr. Hobbs: Oh, yes, that is right.

Mr. Carstarphen: If the Court please, representing the Corporation Counsel's Office of the City of New York, I want to make a little statement in regard to this. We appear specially in The American Brake Shoe case and have received copies of orders and so forth. We have been named as a party defendant in the Johnson case. We propose at the proper time to take such action as we

may see fit in that case, but the time has not yet expired in which we may either move to dismiss or do anything else we see fit. We would therefore say that, so far as the consolidation of the two are concerned, we are neither objecting to it nor consenting to it. But we would, so far as the Johnson case is concerned, not care to have, through any appearance that Mr. Tuttle makes, or what anyone else here says seem to bind the City of New York in connection with that, because we propose very properly to file a motion to dismiss as to that action against The City of New York. Our time has not yet expired in which to act. So we would like that any order that is entered would not show anything differently than that, so far as The City of New York is concerned.

The Court: Now I have written in and signed the following, and initialed it at both ends, and indicated where it comes in the decree, so the decree will now read:

"The Court being fully advised in the premises, and on its own initiative, against the objection and protest of the defendants above named and The American Brake Shoe and Foundry Company, complainant in the second above entitled cause, No. E. 70-364, and the intervenors in the said last mentioned cause, with the exception of Harold Palmer, et al. Protective Committee of the Manhattan Railway Guaranteed Stock, it is

"Ordered, adjudged and decreed that the above entitled action". That preserves everybody's rights, I think.

Mr. Kohler: If your Honor please, speaking for The City of New York, the City did not take any part. It was, however, made a party to the Johnson suit.

The Court: Well, you object.

Mr. Kohler: In that recital——

The Court: Over the objection.

Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.

Mr. Kohler: We do not object to this order. As a matter of fact, we are going to move to dismiss the complaint against us as not stating a cause of action.

The Court: That is all right.

Mr. Kohler: Your Honor has read it as though we objected to the order of consolidation, but for various reasons we prefer not to have that stated. We are neither opposing nor consenting.

The Court: Well, I will just as leave say that The City of New York, made a party there——

Mr. Kohler: Yes.

The Court: Yes.

Mr. Kohler: Not in The American Brake Shoe case, but in the Johnson case; that is the only case.

The Court: Yes, "The City of New York, defendant in Equity No. 71-153, neither consenting nor opposing".

Mr. Kohler: Precisely.

The Court: All right. Now, that is an insert written in in my handwriting. Now that is fixed.

(Signing order.) All right. Now, Mr. Follmer, Mr. Clerk, will you go over, please, and file this in the Clerk's Office, stamp it filed and note the precise time at which it is filed under the mark of the filing, and sign it yourself and then bring it back to me and we will take up the other order.

(Mr. Follmer takes the order and then leaves the room.)

The Court: If you have copies of the other order I might just be looking at that pendente lite.

Mr. Boehm: Yes, sir (handing copy).

(Further proceedings temporarily suspended pending the return of Mr. Follmer.)

Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders. 298

The Court: Mr. Follmer, the Clerk, returns with the order of consolidation stamped "Filed, United States District Court, October 18, 1932, at 3.08 P. M."

Now you can submit the order dealing with the rest of the motion. Has that been sent to the Clerk's office?

Mr. Follmer: That has been presented to the Clerk's office (handing to the Court).

The Court: Now, is there any objection to the form of this order?

Mr. Tuttle: In view of the fact, your Honor, that 2984
our objections to this decision and this order appear on the record as full and complete, we have no suggestions as to the particular form which has been proposed.

The Court: (Examining order) The last paragraph of that order does not follow the wording of what I said there, and I do not think it is quite as clear (reading):

"It is ordered and adjudged that the said moving parties seeking appointment of new receivers"—I don't see why you did not follow the wording that I have there.

Mr. Franklin: You mean in reference——

The Court: In the order. 2985

Mr. Boehm: That was inadvertently omitted.

The Court: Well, now, you haven't got this form of the whole thing. You begin by saying "They both are denied without prejudice at the present time". Now that is the way it reads, that last clause. I think you ought to have in the recital "came on to be heard on orders to show cause"—ought you not to have something in there?

Mr. Boehm: I think it is in there, yes.

Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.

The Court: Where is it?

Mr. Boehm: At the very beginning, "The case of Benjamin F. Johnson against Manhattan Railway Company came on to be heard at this Term, and was argued by counsel, thereupon consideration——"

Mr. Franklin: That is the order to show cause.

The Court: That is a decretal thing. It came on to be heard on three orders to show cause.

Mr. Boehm: Yes.

The Court: I think that ties it up with the previous thing.

Mr. Franklin: Yes.

The Court. That is all right. And then down below here I have got it so it reads that:

"Ordered, adjudged and decreed that the said motions, insofar as they seek the appointment of new Receivers be and they hereby are denied without prejudice at the present time, but if no appeal is taken within twenty days or if, after the decision on such appeal as may be taken within that time, this order is affirmed, then after the entry of the mandate of the appellate court in this court, a new application for such appointment may be made in pursuance of General Rule IIa of this Court to the Judge who at that time may be assigned to hold the Bankruptcy and Motion Part of the business of this Court; and it is further

"Ordered, adjudged and decreed that insofar as said motions seek to have vacated the orders made and signed on August 25, 1932, by Honorable Martin T. Manton in his capacity as Senior Circuit Judge, be denied for want of jurisdiction", and I sign it, and it is dated New York City, October 18th, 1932, signed at 3.37 p. m. (Signs order.)

 298

Now, Mr. Clerk, you may file that and note the time of its filing, just as you did in the other case. Have you got the other one with you now?

Mr. Follmer: I have it here.

The Court: All right. And that is so there won't ever be any dispute as to the order of their signing or the time at which they were filed.

Now, Mr. Stenographer, I want to have these records —the other has been filed, the previous hearing—I want to have this filed, please, in court, that we have taken 2990
down today, so that we can have a full record of exactly what has happened.

I think that concludes our meeting.

(Hearing closed.)

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Stipulation re Contents of Transcript of Record.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.,* *Defendants.*	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

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IT IS HEREBY STIPULATED AND AGREED by and between the solicitors for the appellants and appellees that the transcript of record to be filed in the United States Circuit Court of Appeals for the Second Circuit, pursuant to the appeals heretofore allowed on the order made and entered on September 20, 1932, granting Benjamin F. Johnson leave to file his bill of complaint, and the order

made and entered October 18, 1932, consolidating the above entitled cause In Equity E. 70-364, and the above entitled cause, "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E. 71-153" into one cause, entitled "In the Matter of the Interborough-Manhattan Receivership Proceedings, In Equity E. 71-153", and from the order made and entered October 18, 1932, vacating and setting aside ~~and every certain~~ order heretofore made by Hon. Martin T. Manton in said cause, In Equity E. 70-364, shall include the following:

With respect to the first above entitled cause:

1. Equity subpoena.
2. Order granting leave to file bill of complaint.
3. Petition for leave to file bill of complaint.
4. Order to show cause of September 21, 1932, on petition of Benjamin F. Johnson.
5. Petition of Benjamin F. Johnson.
6. Bill of complaint.
7. Order granting leave to Lillian Boehm to intervene as party plaintiff.
8. Petition of Lillian Boehm for leave to intervene.
9. Order granting leave to intervene to Manhattan Railway Company's Common Stockholders' Protective Committee.
10. Petition of Manhattan Railway Company's Common Stockholders' Protective Committee for leave to intervene.
11. Petition for contingent intervention by Harold Palmer and others as the Protective Committee for holders of Manhattan Seven Per Cent. Guaranteed Stock.
12. Order to show cause of October 1, 1932, on petition of Benjamin F. Johnson.
13. Petition of Benjamin F. Johnson, verified October 1, 1932.

2998 *Stipulation re Contents of Transcript of Record.*

14. Supplemental bill of complaint of Benjamin F. Johnson.
15. Supplemental subpoena.
16. Supplemental bill of complaint of Lillian Boehm.
17. Order to show cause of October 3, 1932, on petition of Lillian Boehm.
18. Petition of Lillian Boehm.
19. Supplemental petition of Benjamin F. Johnson verified October 5, 1932.
20. Designation order, American Brake Shoe record.
21. Division of business order, American Brake Shoe
2999 record.
22. American Brake Shoe bill of complaint, and date of filing thereof.
23. Interborough answer in American Brake Shoe case.
24. Affidavit of James L. Quackenbush in American Brake Shoe case.
25. Order appointing temporary Receivers—American Brake Shoe case.
26. Order appointing Receivers' counsel—American Brake Shoe case.
27. Receivers' application No. 1—American Brake Shoe case.
3000 28. Affidavit of Receivers' counsel—American Brake Shoe case.
29. Consent and waiver of notice as to appointment of Receivers—American Brake Shoe case.
30. Petition and order granting leave to intervene to Committee for Interborough First and Refunding Mortgage 5% Gold Bonds—American Brake Shoe case.
31. Petition and order granting leave to intervene to Committee for Interborough Rapid Transit Co. Ten Year Secured Convertible 7% Gold Notes—American Brake Shoe case.

32. Petition and order for intervention to Committee for Protection of Holders of Ten Year 6% Gold Notes of Interborough—American Brake Shoe case.
33. Petition of Manhattan Railway Company for extension of receivership—American Brake Shoe case.
34. Order appointing temporary Receiver for Manhattan Railway Co.
35. Notice of Motion for leave to intervene to Committee of Manhattan Seven Per Cent. Guaranteed stock—American Brake Shoe case. 300
36. Proposed order of intervention of Committee for Manhattan Seven Per Cent. Guaranteed Stock—American Brake Shoe case.
37. Motion for leave to intervene of Committee for Manhattan Seven Per Cent. Stock—American Brake Shoe case.
38. Petition for intervention by Committee for Manhattan Seven Per Cent. stock—American Brake Shoe case.
39. Exhibit 1 annexed to petition for intervention by Protective Committee—American Brake Shoe case.
40. Receivers' petition respecting Seven Per Cent. Notes—American Brake Shoe case. 3003
41. Petition and order granting leave to intervene to Committee for Manhattan Railway Co. Consolidated Mortgage Gold 4% Bonds—American Brake Shoe case.
42. Manhattan Railway Co. receivership—affidavit showing action of an approval by Manhattan Board of Directors—American Brake Shoe case.
43. Petition and order authorizing Receivers to number documents and papers—American Brake Shoe case.

004 *Stipulation re Contents of Transcript of Record.*

44. Receivers' application No. 3, September 8, 1932—American Brake Shoe case.
45. Petition and order authorizing Receivers to maintain a printed record of all documents—American Brake Shoe case.
46. Receivers' application No. 4, September 8, 1932—American Brake Shoe case.
47. Petition and order authorizing Receivers to pay expenses for registration and transfer of stock of Interborough Rapid Transit Co.—American Brake Shoe case.

005 48. Receivers' application No. 5, September 8, 1932—American Brake Shoe case.
49. Order deferring payment of State Franchise tax—American Brake Shoe case.
50. Receivers' application No. 6 as to postponement of state franchise tax—American Brake Shoe case.
51. Order appointing counsel for Receiver of Manhattan Railway Co.—American Brake Shoe case.
52. Application No. 1 of Receiver of Manhattan Railway Co. as to appointment of counsel—American Brake Shoe Case.
53. Affidavit by counsel for Receiver of Manhattan Railway Co.—American Brake Shoe case.

006 54. Order appointing tort creditors' committee—American Brake Shoe case.
55. Amendment of order appointing tort Creditors' Committee—American Brake Shoe case.
56. Order granting Central Hanover Bank & Trust Co. leave to intervene—American Brake Shoe case.
57. Petition of Central Hanover Bank & Trust Co. for leave to intervene—American Brake Shoe case.
58. Application of publication of notice to creditors—American Brake Shoe case.

59. Substituted petition for intervention by Protective Committee for Seven Per Cent. Stock of Manhattan Railway Co.—American Brake Shoe case.
60. Notice of filing amended and substituted petition for intervention on behalf of Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Co.—American Brake Shoe case.
61. Petition for intervention of Elon S. Hobbs—American Brake Shoe case.
62. Receivers' application No. 9—American Brake Shoe case.
63. Order making Guaranty Trust Co. a party— 3008
American Brake Shoe case.
64. Order authorizing Receivers to employ court reporters—American Brake Shoe case.
65. Receivers' application No. 7—American Brake Shoe case.
66. Waiver and consent—American Brake Shoe case.
67. Notice of motion for order respecting Sinking Fund moneys—American Brake Shoe case.
68. Receivers' application No. 8—American Brake Shoe case.
68-a. Order respecting Sinking Fund moneys—American Brake Shoe case.
69. Notice by Receiver of Manhattan Railway Co. of 3009
application for order re interest due on First Mortgage Bonds of Manhattan Company—American Brake Shoe case.
70. Petition of Receiver of Manhattan Railway Co. for order for payment of interest on First Mortgage Bonds of Manhattan and for payment of taxes—American Brake Shoe case.
71. Answer of Committee for Interborough Rapid Transit Co. Ten Year 6% Gold Notes to petition by Receiver of Manhattan Railway Co.—American Brake Shoe case.

3010 *Stipulation re Contents of Transcript of Record.*

72. Answer of Committee for Interborough Rapid Transit Co. Ten Year 6% Gold Notes to Receivers' petition for instructions—American Brake Shoe Case.
73. Answer of Guaranty Trust Co. to petition of Manhattan Receiver—American Brake Shoe case.
73-a. Answer of Guaranty Trust Co. to petition of Interborough Receivers—American Brake Shoe case.
74. Answer of Committee representing Interborough Ten Year Convertible 5% Gold Bonds to petition of Manhattan Receiver—American Brake Shoe
3011 case.
75. Answer of Committee representing Interborough 5% Gold Bonds to petition of Interborough Receivers—American Brake Shoe case.
76. Answer of Committee representing Interborough Ten Year Secured Convertible 7% Gold Notes to petition of Interborough Receivers—American Brake Shoe case.
77. Notice of appearance on behalf of Guaranty Trust Company of New York, as Trustee—American Brake Shoe case.
78. Order continuing receivership—American Brake Shoe case.
3012
79. Order granting leave to intervene to Protective Committee for Seven Per Cent. stock of Manhattan Railway Co.—American Brake Shoe case.
80. Order granting leave to Central Hanover Bank and Trust Co. to make Receivers parties defendant to bill of complaint—American Brake Shoe case.
81. Petition of Central Hanover Bank and Trust Co. to make Receivers parties defendant to bill of complaint—American Brake Shoe case.
82. Answer of Receiver of Manhattan Railway Company to petition of Receivers of Interborough—American Brake Shoe case.

83. Answer of American Brake Shoe and Foundry Company to petition of Interborough Receivers—American Brake Shoe case.
84. Answer of American Brake Shoe and Foundry Company to petition of Receiver of Manhattan Railway Company—American Brake Shoe case.
85. Notice of motion and petition of Central Hanover Bank and Trust Company, as Trustee, for payment of taxes and interest.—American Brake Shoe case.
86. Petition of Central Hanover Bank and Trust Co. as Trustee for payment of taxes and interest— 301
American Brake Shoe case.
87. Exhibit A annexed to petition—bill of complaint —American Brake Shoe case.
88. Bond of William Roberts, Receiver of Manhattan Railway Co.—American Brake Shoe case.
89. Bond of Thomas E. Murray, Jr., Receiver of Interborough—American Brake Shoe case.
90. Bond of Victor J. Dowling, Receiver of Interborough—American Brake Shoe case.
91. Affidavit of Victor J. Dowling—American Brake Shoe case.
92. Affidavit of publication of notice to creditors of Manhattan Railway Co.—American Brake Shoe 301
case.
93. Notice of motion by Protective Committee for Seven Per Cent. stock of Manhattan Railway Company re Receivers' application No. 9—American Brake Shoe case.
94. Motion of Protective Committee for Manhattan Railway Co. Seven Per Cent. Guaranteed stock relating to proposed instructions to Receivers on application No. 9—American Brake Shoe case.
95. Proposed order as to Seven Per Cent. stock of Manhattan Company in relation to Receivers' application No. 9. American Brake Shoe case.

Stipulation re Contents of Transcript of Record.

96. Answer of Interborough Receivers to petition of William Roberts, Receiver of Manhattan. American Brake Shoe case.
97. Supplemental petition of Receivers to application No. 9. American Brake Shoe case.
98. Affidavit of H. M. Fisher and sheets annexed thereto. American Brake Shoe case.
99. Opinion on petition of Interborough Receivers and Manhattan Receiver, re payment of past due taxes, interest on Manhattan bonds. American Brake Shoe case.
100. Answer of Central Hanover Bank and Trust Company to petition of Interborough Receivers of September 28, 1932. American Brake Shoe case.
101. Petition of Chadbourne, Stanchfield & Levy to terminate their employment as counsel for Interborough Receivers. American Brake Shoe case.
102. Order terminating employment of Chadbourne, Stanchfield & Levy, as solicitors for Interborough Receivers. American Brake Shoe case.
103. Order appointing Hornblower, Miller, Miller & Boston, solicitors for Interborough Receivers. American Brake Shoe case.
104. Affidavit of Nathan L. Miller. American Brake Shoe case.
105. Affidavit of J. Osgood Nichols, verified October 5, 1932.
106. Exhibit A annexed to the affidavit of J. Osgood Nichols of October 5, 1932. (Not to be printed twice.)
107. Exhibit B annexed to the affidavit of J. Osgood Nichols of October 5, 1932. (Not to be printed twice.)
108. Exhibit C annexed to the affidavit of J. Osgood Nichols of October 5, 1932, consisting of bill of complaint and certain orders obtained by and on behalf of complainant in the Barber case. (The same not to be printed twice.)

Stipulation re Contents of Transcript of Record. 301

109. Affidavit of Martin A. Leach, verified October 5, 1932.
110. Affidavit of William Roberts, verified October 6, 1932.
111. Affidavit of William Roberts, verified October 8, 1932.
112. Affidavit of Charles Franklin, verified October 8, 1932.
113. Affidavit of Louis Boehm, verified October 8, 1932.
114. Stipulation extending Interborough Receivers' time to answer.
115. Stipulation extending Manhattan Receivers' time 3020
to answer.
116. Opinion of Judge Woolsey.

With respect to the above entitled consolidated cause:

117. Summons to appeal from order of Judge Caffey of September 20, 1932, granting Benjamin F. Johnson leave to sue, and refusal subjoined thereto.
118. Order of severance on appeal from said order of September 20, 1932.
119. Petition for appeal from said order of September 20, 1932, and order of allowance subjoined thereto.
120. Assignment of errors on appeal from said order 3021
of September 20, 1932.
121. Statement re bond on appeal from said order of September 20, 1932.
122. Citation on appeal from said order of September 20, 1932, and admission of service thereof.
123. Order of Judge Woolsey of October 18, 1932, consolidating the first two above entitled causes.
124. Summons to appeal from order of Judge Woolsey of October 16, 1932, consolidating the first two above entitled causes, and refusal subjoined thereto.

022 *Stipulation re Contents of Transcript of Record.*

125. Order of severance on appeal from said order of October 18, 1932.
126. Petition for appeal from said order of October 18, 1932, and order of allowance subjoined thereto.
127. Assignment of errors on appeal from said order of October 18, 1932.
128. Statement re cost bond on appeal from said order of October 18, 1932.
129. Citation on appeal from said order of October 18, 1932, and admission of service thereof.
130. Order of Judge Woolsey of October 18, 1932, va-
023 cating orders made by Judge Manton in the second above entitled cause.
131. Summons to appeal from order of Judge Woolsey of October 18, 1932, vacating orders made by Judge Manton in the second above entitled cause, and refusal subjoined thereto.
132. Order of severance on appeal from said order of October 18, 1932.
133. Petition for appeal from said order of October 18, 1932, and order of allowance subjoined thereto.
134. Assignment of errors on appeal from said order of October 18, 1932.
135. Statement re cost bond on appeal from said order
024 of October 18, 1932.
136. Citation on appeal from said order of October 18, 1932, and proof of service thereof.
137. Stipulation of parties as to the correctness of transcript of record.
138. Stipulation of parties permitting all appeals to be heard on one record.
139. This stipulation.
140. Order approving stipulation as to contents of record.
141. Motion of Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway

Company to strike the name of the Committee from citations on appeal, and order denying the same.

142. Stipulation waiving the printing of the bonds on appeal.

143. Stipulation waiving printing of verifications to pleadings, and affidavits of service.

144. Minutes of Hearings before Judge Woolsey on October 4th, 6th and 18th, 1932.

Dated, New York, October 27, 1932.

BREED, ABBOTT AND MORGAN
Solicitors for Appellant, The American Brake Shoe and Foundry Company.

JAMES L. QUACKENBUSH
Solicitors for Appellant Interborough Rapid Transit Company.

DILLS, MUECKE AND SCHELKER
Solicitors for Appellant Manhattan Railway Company.

HORNBLOWER, MILLER, MILLER & BOSTON
Solicitors for Appellants Victor J. Dowling and Thomas E. Murray, Jr., as Receivers.

HUGHES, SCHURMAN AND DWIGHT
Solicitors for Appellant William Roberts, as Receiver.

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellants J. P. Morgan and others, as Committee for Interborough Rapid

028 *Stipulation re Contents of Transcript of Record.*

Transit Company Ten Year Secured Convertible 7% Gold Notes and as Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

ROOT, CLARK & BUCKNER
Solicitors for Appellants Charles Hayden and others, as Committee for Ten Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit
029 Company.

COTTON, FRANKLIN, WRIGHT & GORDON
Solicitors for Appellants Van Santvoord Merle-Smith and others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, due April 1, 1990.

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellant Guaranty Trust Company of New
030 York, as Trustee under the first and Refunding Mortgage of the Interborough Rapid Transit Company dated March 20, 1913.

CHARLES FRANKLIN
Solicitor for Appellees Benjamin F. Johnson and Manhattan Railway Company Common Stockholders' Protective Committee.

BOEHM & ZEIGER
Solicitors for Appellee Lillian Boehm.

MARSHALL & WEHLE
Solicitors for Appellee Harold Palmer and others, as Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company.

DAVIES, AUERBACH AND CORNELL
Solicitors for Appellee-Appellant Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company. 303

Order Approving Stipulation Re Record.

The foregoing stipulation is hereby approved and it is

ORDERED, that the transcript of record shall be made accordingly.

Dated at New York City, this ~~27th~~ 21st day of ~~October~~ November, 1932. 3033

ROBERT P. PATTERSON
U. S. D. J.

3034

Stipulation Waiving Printing of Verifications.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, Complainant, *against* MANHATTAN RAILWAY COMPANY, *et al.*, Defendants.	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, *against* INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

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3036

IT IS HEREBY STIPULATED AND AGREED by and between the solicitors for the appellants and the appellees that all pleadings which are to be printed as part of the transcript of record on the appeals in the above entitled causes be deemed properly verified and the printing of the verifi-

cation of said pleadings in the transcript of record, be and the same is hereby waived.

Dated, New York, October 25, 1932.

BREED, ABBOTT AND MORGAN
Solicitors for Appellant, The American Brake Shoe and Foundry Company.

JAMES L. QUACKENBUSH
Solicitor for Appellant Interborough Rapid Transit Company.

DILLS, MUECKE & SCHELKER
Solicitors for Appellant Manhattan Railway Company.

HORNBLOWER, MILLER, MILLER & BOSTON
Solicitors for Appellants Victor J. Dowling and Thomas E. Murray, Jr., as Receivers.

HUGHES, SCHURMAN AND DWIGHT
Solicitors for Appellant William Roberts, as Receiver.

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellants J. P. Morgan and others, as Committee for Interborough Rapid Transit Company Ten Year Secured Convertible 7% Gold Notes and as Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

040 *Stipulation Waiving Printing of Verifications.*

ROOT, CLARK & BUCKNER
Solicitors for Appellants Charles Hayden and others, as Committee for Ten Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

COTTON, FRANKLIN, WRIGHT & GORDON
Solicitors for Appellants Van Santvoord Merle-Smith and
041 others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, due April 1, 1990.

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellant Guaranty Trust Company of New York, as Trustee under the first and Refunding Mortgage of the Interborough Rapid Transit Company dated March 20, 1913.

042

CHARLES FRANKLIN
Solicitor for Appellees Benjamin F. Johnson and Manhattan Railway Company Common Stockholders' Protective Committee.

BOEHM & ZEIGER
Solicitors for Appellee Lillian Boehm.

Stipulation Waiving Printing of Verifications. 3043

MARSHALL & WEHLE
Solicitors for Appellee Harold Palmer and others, as Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company.

DAVIES, AUERBACH AND CORNELL
Solicitors for Appellee-Appellant Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company. 3044

3045

3046

Stipulation re Hearing of Appeals on One Record.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, Complainant, *against* 3047 MANHATTAN RAILWAY COMPANY, *et al.*, Defendants.	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, *against* INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	IN EQUITY E. 70-364
3048 IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the appeals from the following orders, to wit,

1. Appeal from Order of Judge Caffey made and entered September 20, 1932, granting Benjamin F. Johnson leave to sue.

2. Appeal from order of Judge Woolsey made and entered October 18, 1932, consolidating the causes of Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E-71-153, and American Brake Shoe & Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364.
3. Appeal from order of Judge Woolsey made and entered October 18, 1932, vacating certain orders made by Judge Martin T. Manton in the cause entitled, American Brake Shoe & Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364. 3050

be heard upon the foregoing transcript of record.

Dated, October 28th, 1932.

BREED, ABBOTT AND MORGAN
Solicitors for Appellant The American Brake Shoe and Foundry Company.

JAMES L. QUACKENBUSH 3051
Solicitor for Appellant Interborough Rapid Transit Company.

DILLS, MUECKE AND SCHELKER
Solicitors for Appellant Manhattan Railway Company.

HORNBLOWER, MILLER, MILLER & BOSTON
Solicitors for Appellants Victor J. Dowling and Thomas E. Murray, Jr., as Receivers.

3052 *Stipulation re Hearing of Appeals on One Record.*

HUGHES, SCHURMAN AND DWIGHT
Solicitors for Appellant William Roberts, as Receiver.

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellants J. P. Morgan and others, as Committee for Interborough Rapid Transit Company Ten Year Secured Convertible 7% Gold Notes and as Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

3053

ROOT, CLARK & BUCKNER
Solicitors for Appellants Charles Hayden and others, as Committee for Ten Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

COTTON, FRANKLIN, WRIGHT & GORDON
Solicitors for Appellants Van Santvoord Merle-Smith and others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990.

3054

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellant Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company dated March 20, 1913.

DAVIES, AUERBACH AND CORNELL
Solicitors for Appellant-Appellee Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company.

CHARLES FRANKLIN
Solicitor for Appellees Benjamin F. Johnson; and ~~Nathan L. Amster and others, as~~ Manhattan Railway Company Common Stockholders' Protective Committee.

BOEHM & ZEIGER
Solicitors for Appellee Lillian Boehm.

MARSHALL & WEHLE
Solicitors for Appellees Harold Palmer and others, as Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company.

Stipulation as to Correctness of Transcript of Record.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON, Complainant, *against* MANHATTAN RAILWAY COMPANY, *et al.*, Defendants.	IN EQUITY E. 71-153
THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, *against* INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	IN EQUITY E. 70-364
IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.	IN EQUITY E. 71-153

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a correct and true transcript of the record of the said District Court in the above entitled causes as agreed upon by the parties and the clerk may so certify.

Dated, New York, October 28th, 1932.

BREED, ABBOTT AND MORGAN
Solicitors for Appellant The American Brake Shoe and Foundry Company.

JAMES L. QUACKENBUSH
Solicitor for Appellant Interborough Rapid Transit Company.

DILLS, MUECKE AND SCHELKER
Solicitors for Appellant Manhattan Railway Company.

HORNBLOWER, MILLER, MILLER & BOSTON
Solicitors for Appellants Victor J. Dowling and Thomas E. Murray, Jr., as Receivers.

HUGHES, SCHURMAN AND DWIGHT
Solicitors for Appellant William Roberts, as Receiver.

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellants J. P. Morgan and others, as Committee for Interborough Rapid Transit Company Ten Year Secured Convertible 7% Gold Notes and as Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

ROOT, CLARK & BUCKNER
Solicitors for Appellants Charles Hayden and others, as Committee for Ten Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

064 *Stipulation as to Correctness of Transcript of Record.*

COTTON, FRANKLIN, WRIGHT & GORDON
Solicitors for Appellants Van Santvoord Merle-Smith and others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990.

DAVIS, POLK, WARDWELL, GARDINER & REED
065 Solicitors for Appellant Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company dated March 20, 1913.

DAVIES, AUERBACH AND CORNELL
Solicitors for Appellant-Appellee Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company.

CHARLES FRANKLIN
066 Solicitor for Appellees Benjamin F. Johnson; and ~~Nathan L. Amster and others, as~~ Manhattan Railway Company Common Stockholders' Protective Committee.

BOEHM & ZEIGER
Solicitors for Appellee Lillian Boehm.

MARSHALL & WEHLE
Solicitors for Appellees Harold Palmer and others, as Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company.

306

Clerk's Certificate to Transcript of Record.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK. } ss.:

I, CHARLES WEISER, Clerk of the District Court of the United States for the Southern District of New York, DO HEREBY CERTIFY that the foregoing is a true and correct transcript of the records and proceedings had in said court, in the case of Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E. 71-153; in the case of the American Brake Shoe & Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364, and in the Matter of Interborough-Manhattan Receivership Proceedings, In Equity E. 71-153, as agreed on by the parties. 3068

IN TESTIMONY WHEREOF, I have caused the seal of said court to be hereunto affixed at the City of New York in the Southern District of New York, this ~~28th~~ 17 day of November ~~October~~, in the year of our Lord, One thousand nine hundred and thirty-two, and of the Independence of the United States, the 157th.

CHARLES WEISER
Clerk of the United States District Court for the Southern District of New York. 3069

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 203

Argued November 14, 1932. Decided December 7, 1932

BENJAMIN F. JOHNSON and LILLIAN BOEHM, Appellees,

v.

MANHATTAN RAILWAY COMPANY et al., Appellants

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Chase, Circuit Judges

Appeals by the Interborough Rapid Transit Company and others from three decrees of the District Court for the Southern District of New York.

Charles H. Tuttle, of New York City, for the American Brake Shoe & Foundry Co.

Nathan L. Miller, of New York City, for Dowling and others, Receivers.

Charles Franklin, of New York City, for Benjamin F. Johnson.

Louis Boehm, of New York City, for Lillian Boehm.

L. HAND, Circuit Judge:

The appeals in question are from three decrees in the suit at bar; the first, giving leave to the plaintiff, Johnson, to sue receivers of the Manhattan Railway Company and the Interborough Railway Company appointed in another suit entitled American Brake Shoe Company v. Interborough Rapid Transit Company; the second, declaring void all decrees entered in that suit up to the time when the decree appealed from was entered, October 18th, 1932; the third, consolidating the two suits, 1 F. Supp. 809.

On August 25, 1932, the attorney for the Interborough Rapid Transit Company verified an affidavit in a suit, not yet begun, entitled American Brake Shoe Company v. In-

terborough Rapid Transit Company, alleging that in his judgment it would be undesirable to have a trust company appointed receiver in the cause and giving his reasons. Whether this was acted upon by the Senior Circuit Judge for the Second Circuit does not appear in the record; but it was filed the next day in the District Court. On the twenty-fifth the Senior Circuit Judge signed an order declaring that the public interest required the designation of a Circuit Judge to hold a District Court within the circuit, and designating himself to hold such a court beginning on that day, particularly to hear all questions arising in the American Brake Shoe Company suit. There was already an order of the same judge, dating from 1930, which designated him generally to hold terms of the District Court for the Southern District of New York without limitation of time. On the twenty-fifth the same judge signed another order, declaring that as a judge designated to hold the District Court, he did not assent to the existing distribution by the District Judges of the business of that court, and that, as Senior Circuit Judge, he directed that for thirty days applications for the appointment of receivers might be made to him. This was because of a rule of the District Court then existing, quoted in the margin.[1] These two orders were filed on August twenty-sixth, and on the same day the bill of the American Brake Shoe Company against the Interborough Rapid Transit Company. This in substance alleged that the plaintiff was a simple creditor of the defendant for supplies, and that it sued on behalf of itself and all others who might join. Further, that the defendant was operating a system of subways in the city of New York, under contracts with the city, and a system of elevated street railways, as lessee of the Manhattan Street Railway Company. It was in large default as to its taxes; it had issued three series of funded obligations, two of them secured; it was liable upon an issue of Manhattan Railway

[1] 11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other cause (except where a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy rules), shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge.

bonds, and for certain rentals to the Manhattan shareholders; it was in controversy with the city as to items of their mutual accounts; it had a floating indebtedness of two and a half millions. While its assets "at a fair valuation exceed the amount of its liabilities," it was unable to meet its debts then due, together with those soon to fall due, and was exposed to a default upon a mortgage upon all its assets. If left to dismemberment by execution upon the claims of its creditors, it could not continue to perform its public duties, and there would result "wasteful strife and controversy," which could be prevented only in case the assets were sequestered by a court of equity for "equitable distribution among those entitled thereto." To this end it prayed that the court appoint receivers and enjoin all suits against it. The defendant appeared on the same day and consented to such a decree, and the Circuit Judge appointed receivers. The jurisdiction of the District Court over this cause of action depended upon the diversity of citizenship of the parties.

Thereafter various committees for the protection of different groups of creditors were allowed to become parties, and on September sixth, the Manhattan Railway Company, on its own petition alleging its similar financial embarrassment, also intervened, and a separate receiver was appointed for it at its request. The decree of August twenty-sixth was ex parte, except for the defendant's consent, and contained a rule nisi, returnable on September twenty-second, that "the parties" show cause why the receivership should not be continued pendente lite, "and upon the hearing any other creditor, the defendant or other party in interest may be heard." So far as appears no one objected upon the return day, and the receivership was made permanent by decree entered September twenty-eighth. A large number of other interlocutory decrees were passed by the Circuit Judge before the entry of the decree in the suit at bar of October eighteenth, which vacated them all; but their contents are not important here.

Meanwhile on September twenty-first Benjamin F. Johnson, a citizen of Kentucky and a minority shareholder of the Manhattan Railway Company, filed the bill at bar in the District Court against that company and its receiver, the Interborough Rapid Transit Company and its receivers, the city of New York, and the American Brake Shoe

Company. This was on behalf of himself and all other shareholders who might join, and was preceded by an order on Johnson's petition giving him leave to sue the receivers appointed in the American Brake Shoe Company suit, granted by the District Judge then holding the motion part of that court, under the division of business agreed upon by all the regular District Judges of the Southern District of New York. Johnson's bill alleged that the American Brake Shoe Company's suit was beyond the jurisdiction of the Circuit Judge, and that all the decrees passed by him were void. This because the District Judges had provided for the division of business between them, and had promulgated two rules to that intent, of which one has been already quoted, and the other is to be found in the margin.[2]

These it asserted forbade the action of the Circuit Judge, he not having been designated by the Senior District Judge under Rule 1-a, and not holding the motion term when he appointed the receivers, as required by Rule 11-a. On the merits, the bill set up a cause of suit by the Manhattan Company against the Interborough Rapid Transit Company upon certain claims, and a right to an accounting. It prayed the appointment of receivers and general relief.

On the same day, September twenty-first, Lillian Boehm was given leave by the District Judge holding the motion part, to intervene in Johnson's suit, which she did; she was a citizen of New York, and a shareholder of the Manhattan Railway Company; she was also a creditor of the Interborough Rapid Transit Company. On October third, she filed a supplemental bill, based upon the same general grounds as the American Brake Shoe Company's bill, except that she added that the proceedings in that suit were void, and asked as a preliminary to the appointment of receivers that those appointed by the Circuit Judge be vacated. Johnson also filed a petition supplemental to his original bill, not important to the controversy. A number of other interested parties intervened, but their presence does not affect the issues.

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[2] Rule 1-a. Any judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge.

On the bills and two supporting petitions Johnson and Boehm procured rules nisi from the District Judge holding the motion term, returnable on October fourth, that the orders of the Circuit Judge of August twenty-fifth, designating himself to hold a District Court, and giving him power to appoint receivers, should be vacated; also, his decree appointing receivers on August twenty-sixth, and his decree of September twenty-eighth, making them permanent, pendente lite. The petitions also prayed the appointment of other receivers and general relief. After a hearing upon the return day at which the parties to the American Brake Shoe Company bill appeared, the District Judge holding the motion term, by decree dated October eighteenth vacated all the decrees of the Circuit Judge in the American Brake Shoe Company suit. 1 F. Supp. 809. He refused to vacate the order of designation, and the order giving the Circuit Judge power to appoint receivers; and he also refused to appoint substituted receivers until an appeal was decided, if one were taken. Before entering this decree, he passed a decree ex mero motu, consolidating the suit at bar with that of the American Brake Shoe Company.

The controversy does not touch the substantial relief asked by any of the parties; all acknowledge that the two railways are in such financial straits that a court of equity must take over their assets, to prevent their dismemberment by execution, attachment and the like. The plaintiffs, and those who have intervened, ask for receivers, just as do the parties to the American Brake Shoe Company suit. The dispute touches merely who shall be the receivers, and who the judge to have charge of the receivership. The question at the outset is whether the rules deprive the Circuit Judge of jurisdiction to proceed under the order designating him to hold the District Court. Their language did indeed forbid him to do so; he was a designated judge, and he was not assigned to hold the motion term; he made clear by his order providing that applications for receivers might be made to him, that he did not mean to be bound by them. However, even though they be valid, and though his decrees might therefore be subject to reversal, these need not be so far without color of authority that they might be ignored as a futility, or vacated by another judge in another suit. If the rules altogether sheared him of his powers, we agree

that the parties were not to be put to a phantom suit which would settle nothing, and on whose results they might not later rely. Suitors have an interest in the conclusion of their controversies, and we may assume that a judge of the same court, called upon to exercise his own jurisdiction, might, as an incident, clear from the records decrees which would otherwise appear to impede his own powers, though in fact they did not. Collateral attacks upon proceedings which have no jurisdictional basis are permissible in many situations; e. g., St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222; Simon v. Southern Railway, 236 U. S. 115, 35 S. Ct. 255, 59 L. Ed. 492, though we have found no decisions precisely in point here. Thus we think that these appeals do present the limited issue whether the rules, assuming that they are valid, go to the jurisdiction of the judge who disregards them. But we do not find it necessary to decide as to their validity, because, as we shall show, if directory only, that cannot be tested in a separate suit.

Though we are used to regard questions of jurisdiction as sharp and clear, the fact is otherwise. All valid rules of law are imperative; their violation is generally, though not always, a wrong for which in some form or other relief is usually open, if they result in substantial damage. But for obvious practical reasons not all errors go so far to the root as to make the whole proceeding a complete nullity; else the trouble and expense of litigation would go for nothing and controversy never end. Therefore, the law will not scrutinize too nicely a judge's warrant of authority; he may indeed have so little color of office as to stand like a mere interloper, but that is not ordinarily true, if, being duly qualified as a judge, some effort has been made to conform with the formal conditions on which his particular powers depend. The Supreme Court has several times refused to treat such conditions as essential to the validity of his acts. Ball v. U. S., 140 U. S. 118, 11 S. Ct. 761, 35 L. Ed. 377; McDowell v. U. S., 159 U. S. 596, 16 S. Ct. 111, 40 L. Ed. 271; Ex parte Ward, 173 U. S. 452, 19 S. Ct. 459, 43 L. Ed. 765. Though In re Manning, 139 U. S. 504, 11 S. Ct. 624, 35 L. Ed. 264, depended upon Wisconsin law, at least it is an instance of the same doctrine. Our own decision in Luhrig Collieries Co. v. Interstate C. & D. Co., 287 F. 711, is another; more authoritative indeed than the opinion recognized since

the bidder could scarcely have been held to his bid, if the decree directing the sale had been non coram judice. State ex rel. Buisson v. Lazarus, 33 La. Ann. 1425, holds the same even in the case of a constitutional prohibition. Cf. State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409. It is not wholly clear how far the conditions upon a judge's qualifications may be absent and his acts still be immune from collateral attack. We have not that question before us; we mention the doctrine merely as showing the general indisposition of the law to demand of suitors any inquiry into the title of judges to their office, or into their authority to act in a particular cause.

Here there was no infirmity in the authority of the Circuit Judge except through his disregard of the rules. The statute (Judicial Code § 18), 28 USCA § 22, expressly gave him "all the powers and rights" of a District Judge in that district, with exceptions which enlarge rather than limit the latitude of the grant. He was for all purposes at least a District Judge while his designation lasted; and the rules of that court, taken at their widest, stripped him of his jurisdiction no further than if he were duly qualified as such. So viewed, the question is the same as though a District Judge had himself disregarded them, and appointed a receiver though at the time he was not holding the motion term. We cannot doubt that, however valid the rules may be, such a District Judge's decree would still be a judicial act, unassailable collateral. The agreed distribution of business under section twenty-seven (28 USCA) is merely to promote concord and avoid conflict; it may be imperative, so far as it extends, but it does not go to the essence of the judge's power. That is derived from the statutes and the equity rules. Section thirteen of Title 28, USCA and Equity Rule 1 (28 USCA § 723), which follows it, give a District Judge authority to pass all orders "according to the rules and practice of the court;" compliance with every rule of court is not essential to the judge's jurisdiction, nor may his acts be ignored if they do not conform to all. There is a way to correct such errors which must be followed. Yet unless rules for the distribution of business stand on a different footing from rules in general, the decrees vacated were not the empty words of a mere intruder.

So far as the books show, there is no reason to suppose that they cut deeper into a judge's authority to act than others. Foley v. Utterback, 196 Iowa, 956, 195 N. W. 721. People v. Barbera, 78 Cal. App. 277, 248 P. 304, concerned not a rule but a statute, but it is for that reason more compelling. In Scranton Button Co. v. Neonlite Corp'n, 105 N. J. Eq. 708, 149 A. 369, Chancellor Walker did indeed vacate a decree made on the advice of a vice chancellor who had disregarded a rule for the distribution of business, but his decree was in the same suit, and the property had already come into the custody of the Court of Chancery in another suit. In Case v. U. S., 14 F. (2d) 510 (C. C. A. 8), although Judge Sanborn's order was made in pursuance of section 27 of title 28 (USCA), it had been followed by a statute, temporarily imposing the allocation of business so made by him, until the Northern District of Oklahoma should be organized. Judge Van Valkenburgh, in Ex parte Briggs (D. C.) 15 F. (2d) 84, had earlier reached an opposite result, construing the act as no more than perpetuating the modus vivendi established by Judge Sanborn, and possibly that is the better view. But in any event Congress had, preparatory to the erection of the new district, set limits to the activities of the two District Judges; and if it was permissible to construe this as though the district were already in existence, and the powers of the judges territorially limited, the result followed. It is true that Judge Woodrough's opinion went further, and this is perhaps the reason for Judge Scott's concurrence only in the result. If so, judicial opinion in that circuit was at least equally divided as to the effect of the distribution order, taken by itself; and in any case the decision did not turn upon the point. There is thus little or no color of authority for saying that such rules stand in so exceptional a position. It seems to us that they do not. Certainly they cannot enlarge or lessen the jurisdiction of the court itself (Washington-Southern Nav. Co. v. Baltimore & Philadelphia Steamboat Co., 263 U. S. 629, 635, 44 S. Ct. 220, 68 L. Ed. 480); and there appears to be no greater reason to say that they may do so as to the judges individually, whose powers are as much defined by statute. We think that they are only directory, and their disregard was at most no more than an error.

The appellees reply that the situation is like that where a successor has been appointed, and the superseded judge continues to act. U. S. v. Alexander (D. C.) 46 F. 728; Reed v. Bradford, 141 Ark. 201, 217 S. W. 11. The analogy presupposes that the rules as completely strip of power the judge who disregards them, as though he were out of office. To that we cannot agree, for the reasons we have just given. Indeed the decisions are not uniform even as to the acts of a judge who holds over after his successor is appointed. Carli v. Rhener, 27 Minn. 292, 7 N. W. 139; Hamlin v. Kassafer, 15 Or. 456, 15 P. 778, 3 Am. St. Rep. 176.

The vacating decree at bar properly refused to consider the validity of the order of designation of August twenty-fifth, but the appellees attack it here. They say that it appears both from the affidavit of Quackenbush, and from an opinion of the Circuit Judge in the American Brake Shoe Company suit, rendered after the vacating decree, that the only public interest supporting it was the fear that a trust company might be appointed receiver; and that this is not the kind of interest contemplated by the statute. Even so, the order conferred the statutory authority upon the designated judge. The power to designate, granted by 28 U. S. C. A. § 22, is plainly administrative, and parties are not subject to the peril that everything decided may be upset, unless they can satisfy another court that there was adequate occasion for its exercise. The situation is the same as in People ex rel. Saranac Land & Timber Co. v. Extraordinary Special & Trial Term of Supreme Court, 220 N. Y. 487, 116 N. E. 384, for it does not matter that the condition is the "public interest," rather than the appointing judge's "judgment" of that interest. Section 22 was indeed originally the same as sections 17, 20 and 21 in this regard (28 U. S. C. A. §§ 17, 20, 21), but the section was recast generally in 1922 (42 Stat. 639 [28 U. S. C. A. § 22]), and the failure to retain the original phrase was certainly not intended to have such far-reaching consequences. It cannot be that the act of the Chief Justice, for example, or of a Circuit Justice, is to be subjected to a scrutiny when designating a Circuit Judge, to which it is not open in the case of a District Judge. The power can indeed be abused, but the remedy

may be worse than the evil; it is not to the courts that the public must look for correction.

We have said that if the rules were directory only, we would not consider their validity in this suit, because that question must be raised by direct attack. Unless the appellees had no other recourse, this was the proper way. Grant v. A. B. Leach & Co., 280 U. S. 351, 359, 50 S. Ct. 107, 74 L. Ed. 470; Lively v. Picton, 218 F. 401, 408 (C. C. A. 6); Wagner Electric Mfg. Co. v. Lyndon, 282 F. 219 (C. C. A. 8); Blake v. District Court, 59 F. (2d) 78 (C. C. A. 9). They answer that they did have no other recourse, because they could not safely intervene in the American Brake Shoe Company suit under Equity Rule 37 (28 U. S. C. A. § 723). That rule did not prevent them. It is true that any intervention must be "in subordination to, and in recognition of, the propriety of the main proceeding," but the appellees had no quarrel with that. They too wished a receivership, and indeed had no objection to "the propriety of the main proceeding," except for the judge who was to conduct it, and the receivers appointed. As to both, they had their opportunity to appear on the return day of the rule nisi, September twenty-second, to ask for a removal of the cause to another judge, if the rules forbade the Circuit Judge to proceed, and for the appointment of other receivers. The bill at bar was filed on the twenty-first, a week before the decree passed continuing the receivers pendente lite. Nothing had happened, at least before the twenty-second, to their prejudice, and if it was wrong to proceed in the face of the rules, the objection could then have been raised.

Nor would such a course have deprived them on an appeal, for section 227 of title 28 U. S. C. A. includes interlocutory decrees appointing receivers. The decree of August twenty-sixth was ex parte except as to the defendant which consented; as to all others their first opportunity to object was upon the return day. Pacific Northwest Packing Co. v. Allen, 109 F. 515 (C. C. A. 9); cf. Mitchell v. Lay, 48 F. (2d) 79, 84, 85 (C. C. A. 9); Kingsport Press v. Brief English Systems, 54 F. (2d) 497 (C. C. A. 2). Indeed the original appointment was expressly made temporary, and expired with the later decree; the receivers held thereafter only by appointment under that decree. Grand Beach Co. v. Gardner, 34 F. (2d) 836 (C. C. A. 6),

touched a decree denying a motion to vacate the appointment of a receiver, which had originally been made on notice; it was in substance a decree on rehearing.

The consolidation decree did not change the status of the parties to the suit at bar, though perhaps it was meant to do so. Had it made them parties to the American Brake Shoe Company suit, the rules might be before us, even though only directory. But consolidation does not merge the suits; it is a mere matter of convenience in administration, to keep them in step. They remain as independent as before, and if one hangs for its jurisdiction upon the other, consolidation adds nothing; the dependent jurisdiction is as good without it. Toledo, etc., R. R. Co. v. Continental Trust Co., 95 F. 497, 506 (C. C. A. 6); Taylor v. Logan Trust Co., 289 F. 51, 53 (C. C. A. 8); Nolte v. Hudson Navigation Co., 11 F. (2d) 680, 682 (C. C. A. 2).

Finally, the appellees assert that the decrees are not appealable. The decree granting Johnson leave to sue the receivers, necessarily dissolved the injunction issued in the American Brake Shoe Company suit. True, it did so in another suit, but that can make no difference. The vacating decree likewise dissolved the injunctions granted by the decrees in the American Brake Shoe Company suit, and pro tanto appealable under 28 U. S. C. A. § 227. But it went much further, and seems to us, properly speaking, a final disposition. It vacated all that had been done theretofore, and must consistently have been followed by similar action, if more decrees were passed in the other suit. It did indeed leave the bill on file, but on condition that no proceedings might be taken under it, except by another judge. Certainly this was more than interlocutory.

There is more doubt as to the appealability of the consolidation decree. In so far as it may have attempted to effect an intervention of the parties to the suit at bar in the American Brake Shoe Company suit, along with consolidation, it was probably appealable in any case. Adler v. Seaman, 266 F. 828 (C. C. A. 8). This may have been its province; we are not sure. But in any case it seems to us that it must be within our jurisdiction now, since, if erroneous, there is no other means of correcting the error. It did not affect the substantial rights of the parties; there would be nothing to correct upon appeal from

a final decree, at which for the first time interlocutory proceedings may be brought up. We could only say that though the suits should not have been consolidated, the damage was past and could not be corrected; the question would have become moot and would not survive. Meanwhile the parties would have been forced into a partnership to which they should not have been subjected. In such circumstances, in order to prevent the defeat of our appellate jurisdiction, we may have recourse to the writs appropriate to that situation. As we apprehend that it will not be necessary, we do not now decide which we should use, but content ourselves with saying that the decree seems to us wrong. As we understand that it was intended to be merely ancillary to the vacating decrees, upon the merits they will fall together. It is not therefore necessary to consider whether, standing alone, it was proper.

It appears to us therefore that, taking the appellees' argument at its face as to the validity of the rules, and their protest as to the propriety of the order of designation of August twenty-fifth, the decrees appealed from were erroneous. We have nothing to do now with the sufficiency of Johnson's original bill, or of Boehm's supplementary bill; we express no opinion as to either.

Decrees reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 14th day of December, one thousand nine hundred and thirty-two.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

BENJAMIN F. JOHNSON, Plaintiff-Appellee,

vs.

MANHATTAN RAILWAY COMPANY et al., Defendants-Appellants

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff-Appellant,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, Defendant-Appellant

In the Matter of INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decrees of said District Court be and hereby are reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Benjamin F. Johnson vs. Manhattan Railway Company et al. (and another case). Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 14, 1932. William Parkin, Clerk.

PETITION AND NOTICE OF MOTION TO AMEND OPINION

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

E 71-153

BENJAMIN F. JOHNSON, Complainant-Appellee,

against

MANHATTAN RAILWAY COMPANY et al., Defendants-Appellants

E 70-364

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant-Appellant,

against

INTERBOROUGH RAPID TRANSIT COMPANY, Defendant-Appellant

E 71-153

In the Matter of the INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS

SIRS:

Please take notice, that upon the annexed petition of Benjamin F. Johnson, verified the 14th day of December, 1932, upon the transcript of record herein to this Court, and the opinion of this Court rendered herein on the 7th day of December, 1932, and upon all the proceedings had herein, the undersigned will move this Court at a Term thereof, to be held in the old Post Office Building, Park Row and Broadway, in the Borough of Manhattan, City of New York, on the 19th day of December, 1932, at 10:30 A. M. on said day, or as soon thereafter as counsel can be heard, for an order amending the opinion of this Court hereinabove mentioned, by adding thereto, at the end thereof after the words "decrees reversed" the words "without costs", and for such other and further relief as

to the Court may be deemed just and proper in the premises.

Dated New York, December 14th, 1932.

Yours, etc., Charles Franklin, Solicitor for Complainant Appellee. Office & P. O. address: No. 165 Broadway, Borough of Manhattan, New York City. Boehm & Zeiger, Solicitors for Intervenor Appellee, Lillian Boehm. Office & P. O. address: No. 30 Broad Street, Borough of Manhattan, New York City.

To Breed, Abbott and Morgan, Esqs., Solicitors for Appellant The American Brake Shoe and Foundry Company, No. 15 Broad Street, New York City; James L. Quackenbush, Esq., Solicitor for Appellant Interborough Rapid Transit Company, No. 15 Park Row, New York City; Dills, Muecke and Schelker, Esqs., Solicitors for Appellant Manhattan Railway Company, No. 100 East 42nd Street, New York City; Hornblower, Miller, Miller & Boston, Esqs., Solicitors for Appellants Victor J. Dowling and Thomas E. Murray, Jr., as Receivers, No. 15 Broad Street, New York City.

To Hughes, Schurman and Dwight, Esqs., Solicitors for Appellant William Roberts, as Receiver, No. 100 Broadway, New York City; Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Solicitors for Appellants J. P. Morgan and others, as Committees, etc., 15 Broad Street, New York City; Root, Clark & Buckner, Esqs., Solicitors for Appellants Charles Hayden and others, as Committee, etc., No. 31 Nassau Street, New York City; Cotton, Franklin, Wright & Gordon, Esqs., Solicitors for Appellants Van Santvoord Merle-Smith and others, etc., No. 63 Wall Street, New York City; Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Solicitors for Appellants Guaranty Trust Company of New York, etc., No. 15 Broad Street, New York City.

In the United States Circuit Court of Appeals for the Second Circuit

E 71-153

Benjamin F. Johnson, Complainant-Appellee,

against

Manhattan Railway Company et al., Defendants-Appellants

E 70-364

The American Brake Shoe and Foundry Company, Complainant-Appellant,

against

Interborough Rapid Transit Company, Defendant-Appellant

E 71-153

In the Matter of the Interborough-Manhattan Receivership Proceedings

To the United States Circuit Court of Appeals for the Second Circuit:

The petition of Benjamin F. Johnson respectfully shows to this Court:

1. That he is the complainant in the first above entitled action.

2. That on or about October 18th, 1932, a decree was signed by Judge John M. Woolsey, United States District Judge, consolidating the first above entitled cause with the second above entitled cause under the caption of the third above entitled cause and that upon such consolidation having been made said District Judge John M. Woolsey signed an order vacating and setting aside all the orders made by Senior Circuit Court Judge Martin T. Manton in the second above entitled cause.

3. That thereafter an appeal was prosecuted by the defendants in the first above entitled cause to this Court from

said orders and thereafter such proceedings were duly had that on December 7th, 1932, this Court rendered an opinion reversing the decrees above mentioned.

4. In said opinion Judge Learned Hand did not state that said decrees were reversed without costs and, therefore, as I am informed by the Clerk of this Court, the appellants herein are entitled to tax the costs of said appeal under the rules of this Court providing that in case of the reversal of a decree in this Court, costs shall be allowed to the parties seeking review "unless otherwise ordered by the Court."

5. That on or about December 9th, 1932, there was served upon me a notice that said appellants would apply to the Clerk of this Court on December 12th, 1932, at 10 A. M. for taxation of the costs of the transcript of the record in this case in the sum of $9,427.10, as part of the costs to be inserted in the mandate of this Court.

6. On the return day of said application, the taxation of said costs was adjourned to December 14th, 1932, and on the latter date was again adjourned to December 21st 1932, at 11 A. M.

7. The sum of $9,427.10, which the appellants are endeavoring to tax, is the amount of the printers' bills for printing the transcript of record on appeal herein, which consisted of about 1035 pages. Included in the said bills is an item of approximately $5,800 for about 1,000 hours of overtime, allegedly employed in printing up the record at excessive rates per hour for such work. Said bills also include a charge of $1,252 for printing 120 additional copies of the transcript not used upon this appeal, in addition to the 30 copies for which separate charge is made. It is claimed by your petitioner that the rate for printing the said 30 copies is excessive, and that the said 120 additional copies were unnecessary and were never used by the appellants. The said bills further include items aggregating $383 for remake-up of printed matter, and for other matter which, after printing, was not used in the record.

8. Petitioner alleges that under the circumstances surrounding the prosecution of this case the Court in its dis-

cretion should not award any costs against the appellees for the following reasons:

(a) This proceeding was brought largely for the purpose of testing the right of Senior Circuit Judge Martin T. Manton to appoint himself District Judge in order to take jurisdiction in the second above entitled case, and also to test his right, after he designated himself, to disregard Rules 1-a and 11-a of the General Rules of the United States District Court for the Southern District of New York. In instituting said cause, the appellees rendered a distinct public service in endeavoring to have the validity of the procedure of Senior Circuit Judge Martin T. Manton passed upon and to have it determined whether such procedure was in accordance with ruling authority, and particularly whether said Rules 1-a and 11-a have binding force, and also to have it established at the outset of the second of the above entitled causes, whether such proceeding was based upon a sound foundation, so that all parties could deal with the Receivers of said Interborough Rapid Transit Company in the assurance that their appointment was without any jurisdictional defects. The Interborough and Manhattan interests themselves were benefited by said appeal and adjudication.

(b) The question determined on this appeal was one of prime public importance and of wide public interest, not only in the Southern District of New York and this Circuit, but in all the circuits throughout the country, determining the jurisdiction and power of the Senior Circuit Judge to designate himself to sit in the District Court and his rights and powers when sitting in the District Court, in relation to the rule making powers of the District Court and its rules for the division of business made pursuant thereto. This question necessarily required adjudication of this Appellate Court sooner or later, and the sooner the better, for it affected the orderly administration of justice in the Southern District of New York, and the proper functioning of the District and Circuit Courts throughout the country.

(c) This is not a proceeding where the defendants are in the same position as private parties, who had spent money out of their own pocket to defend their individual rights, but it is rather a case where the receivers of large quasi-public corporations engaged in transportation are the de-

fendants, so that any moneys spent in prosecuting the appeal will not come out of the pockets of such receivers, but will be so distributed that no one person will have to bear much of a burden in defraying the expense. This consideration should have particular weight in view of the fact that at the time of the receivership said Interborough Rapid Transit Company had in excess of $9,000,000 in cash in its treasury.

Under the above unusual state of facts, the petitioner submits that a great injustice would be done to the appellees if they were muleted in the enormous sum which is sought to be assessed against them, or even in a reduced sum, where the cause was not instituted solely on their own behalf, but on behalf of the minority stockholders and bondholders of the Interborough Rapid Transit Company and Manhattan Railway Company, and where the entire burden of payment would fall upon them who are little able to bear the same in addition to the enormous losses which they have sustained by virtue of the receivership of both said Interborough Rapid Transit Company and Manhattan Railway Company.

Petitioner, therefore, asks that this Court in its discretion amend its opinion, so that said opinion should provide that the decrees referred to be reversed, but without costs.

Dated December 14, 1932.

Benjamin F. Johnson, by Charles Franklin, Solicitor.

State of New York,
County of New York,
Southern District of New York, ss:

Charles Franklin, being duly sworn, deposes and says, that he is the solicitor for the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes the same to be true.

Deponent further says that the grounds of deponent's belief as to all matters not stated upon his knowledge, are his familiarity with this entire litigation from its inception to the date hereof, including the opinion of this Court ren-

dered on the appeal herein and the application made by the solicitors for the receivers of the Interborough Rapid Transit Company to tax the costs of said appeal, and the reason why this verification is made by deponent and not by the petitioner is that said petitioner is not within this jurisdiction, being now in Winchester, Kentucky, where he resides.

Sworn to before me this 14th day of December, 1932.
Llewellyn Hernly, Notary Public Queens County, Queen's Co. Clerk's No. 2151, Queen's Co. Reg's No. 2117, New York's Clerk's No. 672, New York Co. Reg's No. 4H667. Commission expires March 30, 1934.

(Signed) Charles Franklin.

In the United States Circuit Court of Appeals for the Second Circuit

E71-153

Benjamin F. Johnson, Complainant-Appellee,

against

Manhattan Railway Company et al., Defendants-Appellants

E70-364

The American Brake Shoe and Foundry Company, Complainant-Appellant,

against

Interborough Rapid Transit Company, Defendant-Appellant

E71-153

In the Matter of the Interborough-Manhattan Receivership Proceedings

State of New York,
County of New York, ss:

Carl M. Owen, being duly sworn, deposes and says: that he is a member of the firm of Hornblower, Miller, Miller &

Boston, Solicitors for the Receivers of Interborough Rapid Transit Company and makes this affidavit in opposition to the motion to amend the opinion of this court so as to provide that the decrees be reversed without costs.

Prior to the serving of the motion papers on this application, deponent's firm had made an application before the Clerk to tax the cost of the record as part of the costs to be inserted in the mandate of this court. The hearing on this application was adjourned by the Clerk to December 21st to enable the appellees to make this motion.

While it is true that the greater part of the petition upon which this applicaion is based is devoted to reasons why the court should exercise its discretion to omit costs entirely, nevertheless in paragraph 7 of said petition there are statements intended to raise before the court upon this motion the point that the cost of the transcript of record (which is only one item of the taxable costs) was excessive. Deponent submits that the only question properly before this court upon this motion is whether the costs should be included in the decision of the court upon the appeals and that the extent and the amount of those costs should properly be reserved until such time as the clerk has taxed the costs and a dissatisfied party has moved to retax before the court.

However, in view of the statements contained in paragraph 7 of said petition deponent will briefly state the facts respecting the preparation and cost of the transcript of record. The record as finally settled and served consisted of 1025 pages. 150 copies of the transcript were printed. Altogether at the time the transcript of record was served there were 15 parties to the appeals, 4 of whom were appellees on all of the appeals and one of whom (Central Hanover Bank and Trust Company, as Trustee) was an appellee on two of the appeals and an appellant on the third appeal. Deponent is informed and verily believes that under the provisions of the United States Code and the Rules of this Court (28 U. S. Code, Sections 865 and 866; Rule XXI of the Rules of this Court) the appellants had the privilege of filing 50 copies of the transcript of record in this court and had the duty of providing three copies of the transcript for each of the parties to the appeal. These provisions thus required a total of 95 copies.

Additional copies were printed to provide for the event that the case might go to the Supreme Court of the United States. In such event it would be necessary to file 30 additional copies of the transcript in the office of the Clerk of the Supreme Court and to serve a copy of said transcript upon counsel for each of the parties a second time (Rule 13, sub-div. 5 and Rule 38, sub-div. 7 of the Rules of the Supreme Court), thus taking a further 75 copies. This does not take into consideration the fact that on filing the petition for certiorari a copy of the printed record and supporting brief would have to be served on counsel for respondents (Rule 38, sub-div. 3 of the Rules of the Supreme Court).

Paragraph 7 of the petition assumes that it was only necessary to print 30 copies for use upon the appeals to this Court. As shown above, that is not the case.

Two hundred and Twenty-two pages of the transcript consisted of the minutes of the oral argument before Judge Woolsey preceding the entry of the orders appealed from. These minutes were included in the transcript at the insistence of the appellees and over the protest and objection of the appellants. The cost of adding this unnecessary material to the transcript amounted to $710.40.

The claim made by the appellees that they were acting in the public interest is, deponent submits, without foundation. Deponent does not know by what right they made themselves the self-appointed guardians of the public interest. The acts of appellees were a distinct disservice, not only to the parties to the Brake Shoe suit, but also to all the creditors of Interborough Rapid Transit Company and the Manhattan Railway Company. The action of these appellees, without warrant, temporarily put the whole Interborough and Manhattan receiverships under a cloud and seriously embarrassed the creditors and stockholders of the companies. As a matter of fact, every person who is familiar with this proceeding is confident that the entire conduct of the appellees was directed toward getting themselves into some position in the situation. Their activities were in fact self-seeking and not in any way inspired by any public interest.

As a further reason for relieving them from the costs of this appeal, the appellees urged this Court to transfer

the cost to the Interborough security holders in general on the ground that the burden will thus be distributed among a great many, rather than placed upon them. In other words, they ask this Court to lend its assistance and sympathy to a misappropriation of the funds of the receivership estate. Under their doctrine, wherever a receiver appeals and prevails, he nevertheless should pay the expenses of the appeal.

Deponent submits that the Court should take into account that the costs which are taxable are a very small part of the great expense to which the parties to the Brake Shoe Case have been put by reason of the unwarranted procedure of the appellees. The parties to the Brake Shoe Case have had to spend a great deal of money employing counsel in a difficult proceeding to undo the harm caused by the activities of the appellees and, in addition to the expenses of counsel, have had to expend a great deal of money in the preparation and printing of briefs.

Deponent submits that if it were in the power of the Court to make a special award to the appellants by way of penalty to the appellees for a purely vexatious litigation, this is a case where that should be done. It is decidedly not a case where the appellees should be relieved of the payment of legitimate costs.

The appellees have placed in jeopardy for a considerable period the property of the Interborough Rapid Transit Company and Manhattan Railway Company and the interests of their security holders.

Deponent, therefore, respectfully submits that the motion should be denied.

Carl M. Owen.

Sworn to before me this 21st day of December, 1932. Mae J. Cannon, Notary Public, Kings County. Kings Co. Clerk's No. 92, Register's No. 4088. New York Co. Clerk's No. 166, Reg. No. 4085. My Commission Expires March 30, 1934.

[Endorsed:] United States Circuit Court of Appeals for the Second Judicial District. Benjamin F. Johnson, Complainant-Appellees, against Manhattan Railway Company et al., Defendants-Appellants. In Equity. E-71-153. The American Brake Shoe and Foundry Company, Complain-

ant-Appellant, against Interborough Rapid Transit Company, Defendant-Appellant. In Equity. E-70-364. In the Matter of the Interborough-Manhattan Receivership Proceedings. In Equity. E-71-153. Affidavit in opposition to motion to amend opinion. Hornblower, Miller, Miller & Boston, Solicitors for Receivers, Office & Post Office Address, 15 Broad Street, New York City.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 29th day of December, one thousand nine hundred and thirty-two.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

BENJAMIN F. JOHNSON, Plaintiff-Appellee,

vs.

MANHATTAN RAILWAY COMPANY et al., Defendants-Appellants

(And Another Case)

A motion having been made herein by counsel for the appellees to amend the opinion of this court by adding thereto, at the end thereof after the words "decrees reversed" the words "without costs",

Upon consideration thereof it is

Ordered that said motion be and hereby is granted.

Further ordered that the order for mandate hereof entered herein be and herby is amended accordingly.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals Second Circuit. Benjamin F. Johnson vs. Manhattan Railway Co. et al. Order. United States Circuit Court of Appeals-Second Circuit. Filed Dec. 29, 1932. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 1047, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Benjamin F. Johnson, Plaintiff-Appellee, vs. Manhattan Railway Company et al.; The American Brake Shoe and Foundry Company, Plaintiff-Appellant, vs. Interborough Rapid Transit Company, Defendant-Appellant; In the Matter of Interborough-Manhattan Receivership Proceedings, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 10th day of February, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the said United States the one hundred and fifty-seventh.

Wm. Parkin, Clerk. (Seal United States Court of Appeals, Second Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 20, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is advanced and assigned for argument on Monday, April 17th next after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 20, 1933

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